Form No. 7

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.

No. 3123

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3123

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Attorneys of Record.

FRED HARRISON, Fortuna Ledge, Alaska,
IRA D. ORTON, Nome, Alaska,
HUGH O'NEILL, Nome, Alaska,
Attorneys for Plaintiffs.
O. D. COCHRAN, Nome, Alaska,
Attorney for Defendants. [2*]

In the District Court for the Territory of Alaska, Second Judicial Division.

No. —— IN EQUITY.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Complaint.

Comes now the plaintiffs above named, and for cause of action against the above-named defendants complain and allege:

I.

That plaintiffs and defendants are residents of the Wade Hampton Precinct, Territory of Alaska,

II.

That the plaintiff F. Umphrey did, on the 1st day

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*Page-number appearing at foot of page of original certified Transcript of Record.

of April, 1917, make a discovery of gold on the placer mining claim known and described as Creek Placer Mining Claim No. 5 Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and did, on said date, duly stake and mark out the said mining claim by planting four stakes at the four corners of the same as required by law, such stakes being of the dimensions and hewed in the manner prescribed by law, and did post his notice of location by writing the same on the stake known as No. 1 or the Initial Stake.

III.

That thereafter, to wit, on the 2d day of April, 1917, the said plaintiff F. Umphrey did file for record with the United States Commissioner and *ex-officio* recorder of the said district a certificate of location of the said ground, which said certificate of location is in words and figures following, that is to say: [3]

"NOTICE OF RELOCATION.

KNOW ALL MEN BY THESE PRESENTS THAT I, FRED UMPHREY, a citizen of the United States, claim, by right of relocation, 20 acres of the unappropriated public land on the west fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton recording district, Territory of Alaska, to be known as Creek Claim No. 5 Above Discovery West Fork of Willow Creek, more particularly described as follows: to wit:

Commencing at Post No. 1 which is known as the Initial Stake, located at southeasterly corner of

claim, and northeast corner of creek claim No. 4 Above West Fork of Willow Creek, running thence 1320 feet in a northerly direction to Post No. 2, thence running 660 feet in a westerly direction to Post No. 3, thence running 1320 feet in a southerly direction to Post No. 4, running thence 660 feet in an easterly direction to the Initial Post, or Post No. 1, the place of beginning.

Discovery of gold was made on the 1st day of April, 1917, at a point in about the center of the claim and about 50 feet from the downstream boundary line, and a discovery post was planted at that point.

This is intended as a re-location of the claim heretofore located by Ben Blanker on the 4th day of July, 1914, as Creek Claim No. 5 above Discovery West Fork of Willow Creek, certificate of location which is of record in Volume 1 of the records of the said recording district, at page 157.

Date of relocation—April 1st, 1917.

Gold discovered—April 1st, 1917.

F. UMPHREY,

Locator."

—which said certificate of location was on said 2d day of April, 1917, duly recorded in volume 5 of the records of said recording district, at page 154.

IV.

That thereafter, to wit, on said 2d day of April, 1917, the said plaintiff F. Umphrey, by an instrument in writing, duly executed and acknowledged, transferred an interest in the said placer mining claim to the plaintiff, Fred Harrison.

V.

That ever since said 1st day of April, 1917, the plaintiff F. Umphrey, and his grantee, the plaintiff Fred Harrison, have been, and now are, the owners in fee of said mining claim subject only to the paramount title of the United States of America, and as such have been entitled to the possession of the same, and they have been ever since said 1st day of April, 1917, and now are, in possession of the same.

VI.

That the above-named defendants, Chris Betsch and Joe L. Jean claim an interest in the said mining claim adverse to these plaintiffs but that such claim of interest is without right. [4]

VII.

That on the 4th day of April, 1917, the above-named defendants, thru their duly constituted agent, caused to be recorded in the records of the said recording district, an affidavit in which such claim of interest is set out, and which affidavit is in words and figures following, that is to say:

United States of America,
Wade Hampton District,
District of Alaska,—ss.

William Delbar, first duly sworn, upon oath, deposes and says:

That he is the duly constituted agent of one Chris Betsch and Joe L. Jean, and that the said Chris Betsch and Joe L. Jean are the owners of a certain placer mining claim known as No. 5 above discovery on Willow Creek, a tributary of Spruce Creek, situ-

ated in the Wade Hampton Recording District, District of Alaska.

That during the months of October, 1916, to wit, from the first until the twenty-fifth days of said month, continuous mining operations were conducted on a large scale on said claim, consisting of general mining by shoveling into sluice boxes, the building of a ditch, from the upper part of the claim to the center and cutting of a bedrock cross-cut from the center of the creek to the benches.

That more than Fifteen Hundred Dollars has actually been expended in labor on these operations and that the work was performed for the benefit of said claim, and at the instance and in behalf of the said Chris Betsch and Joe L. Jean and at their expense.

That he as the duly constituted agent of the said Chris Betsch and Joe L. Jean actually paid for the labor performed on said claim and as such complied with the requirements of the annual assessment work as prescribed by law, for the current year of 1916.

That at this time the affiant considers and believes that the owners of said claim have been unable to file such proof of labor owing to their absence.

Dated at Fortuna Ledge, this 3d day of April, 1917.

WILLIAM DELBAR.

Subscribed and sworn to before me this 3d day of April, 1917.

[Commissioner's Seal]

M. F. MORAN,

U. S. Commissioner Wade Hampton Precinct, Territory of Alaska.

—which affidavit was duly recorded in the said records at page 41 of volume 8; that the statements contained in said affidavit are not true.

VIII.

That thereafter, to wit, on or about the 5th day of April, 1917, the said defendant, Chris Betsch, wrongfully, without the consent of the plaintiffs, and without authority of law, caused to be posted upon said claim notices of warning to trespassers, signing the names of the defendants thereto as "owners" of the said claim. [5]

IX.

That if the said defendants ever did have any right or interest in the said mining claim, which these plaintiff do not admit, but deny, they abandoned, and forfeited the same before the entry of the plaintiff Umphrey upon the said claim.

WHEREFORE PLAINTIFFS PRAY JUDGMENT:

(a) That an order issue out of this court declaring the plaintiffs to be the owners of the said creek claim No. 5 Above Discovery on the west fork of Willow Creek, and that their title, so far as the defendants are concerned, is a title in fee;

(b) That a further order issue out of this court restraining the defendants, or either of them, their agents, servants, lessees and employees, from molesting or in any manner interfering with the plaintiffs in the free use and enjoyment of the said property by them the said plaintiffs;

(c) That a reasonable sum be awarded these plaintiffs as attorneys' fees in this action, and that they recover their costs and disbursements herein expended;

(d) For such other, further and additional relief as to the Court may seem just and equitable.

FRED HARRISON,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Fred Harrison, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the within entitled action; that he has read the foregoing complaint, knows the contents thereof and that the same are true as he verily believes.

FRED HARRISON.

Subscribed and sworn to before me this 11th day of April, A. D. 1917.

[Notarial Seal] M. F. MORAN,
U. S. Commissioner Wade Hampton Precinct, Territory of Alaska. [6]

[Endorsed]: #2723. No. ——. In the District Court, Territory of Alaska, Second Division. F. Umphrey et al., Plaintiffs, vs. Chris Betsch et al.,

Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 3, 1917. G. A. Adams, Clerk. By ————, Deputy. L. Fred Harrison, Attorney at Law, Notary Public, Iditarod, Alaska. Fortuna Ledge (Marshall City), Alaska. [7]

UNITED STATES OF AMERICA.

District Court, Territory of Alaska, Second Division.

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Summons.

The President of the United States of America,
GREETING: To the Above-named Defendants.

YOU ARE HEREBY REQUIRED to appear in the District Court, in and for the Territory of Alaska, Fourth Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiffs, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will take judgment against you, declaring that the plaintiffs are the owners of creek claim No. 5 Above Discovery on the West Fork of Willow Creek,

a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and that their title, as far as the above-named defendants are concerned, is a title in fee; for a restraining order; attorneys' fees and costs and disbursements, and will apply to the Court for the relief demanded in said complaint.

WITNESS, the Honorable JOHN RANDOLPH TUCKER, Judge of said Court, this 3d day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] G. A. ADAMS,
Clerk. [8]

MARSHAL'S RETURN.

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed Summons on the 15th day of June, 1917, at Fortuna Ledge, Alaska, and thereafter I served the same upon the within named defendant, Joe L. Jean, at Willow Creek, in the Wade Hampton Precinct, District of Alaska, on the 15th day of June, 1917, and upon the within named defendant Chris Betsch at Fortuna Ledge, Alaska, on the 18th day of June, 1917, by delivering to and leaving with each of them, at the times and places above set forth, personally, a certified copy of said Summons together with a certified copy of the complaint, prepared and certified by Fred Harrison, attorney for the plaintiff.

Dated at Fortuna Ledge, Alaska, this 18th day of June, 1917.

E. R. JORDAN,
United States Marshal.
Hugh J. Lee,
Deputy.

MARSHAL'S COSTS.

Two Services Summons	$12.00
Expense of service	4.00
Total	$16.00

[Endorsed]: #2723. Summons Returned. Filed in the Office of the Clerk of the District Court of Alaska. Second Division, at Nome. Jun. 25, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. [9]

In the District Court for the Territory of Alaska, Second Judicial Division.

No. ——.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Answer.

Come now the defendants and answering the complaint of the plaintiffs, admit, deny and allege:

I.

They deny generally each and every allegation contained in paragraph "II" of plaintiffs' complaint.

II.

Answering paragraph "IV" of said complaint, defendants allege that they have no knowledge or information sufficient to form a belief as to the allegation contained in said paragraph, and therefore deny the same and the whole thereof.

III.

Defendants deny generally each and every allegation contained in paragraph "V" of said complaint.

IV.

Answering paragraph "VI" of said complaint, defendants deny that the claim of interest of the defendants in the premises described in plaintiffs' complaint is without right.

V.

Answering paragraph "VII" of said complaint, defendants admit that on the fourth day of April, 1907, one William [10] Delbar caused to be recorded in the records of the Wade Hampton Precinct, an affidavit as set forth in said paragraph "VII" of said complaint, and that said affidavit was recorded at page 41 of Volume 8 of the records of said precinct, and otherwise deny generally each and every other allegation contained in said paragraph.

VI.

Defendants deny generally each and every allegation contained in paragraphs "VIII" and "IX" of said complaint.

For a further and affirmative answer and defense to plaintiffs' complaint, defendants allege that they are the owners in fee, subject only to the paramount title of the Government of the United States, of the ground and premises described in plaintiffs' complaint, and are in the possession and entitled to the possession of the whole thereof.

WHEREFORE, having fully answered plaintiffs' complaint, defendants demand that the action of plaintiffs be dismissed.

O. D. COCHRAN,
Attorney for Defendants.

United States of America,
Territory of Alaska,—ss.

O. D. Cochran, being first duly sworn, says: That he is the attorney for the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true. That this verification is made by affiant for the reason that the defendants are now at Marshall in the Wade Hampton Precinct in the Territory of Alaska, and that verification thereof cannot therefore be made [11] by either of said defendants.

O. D. COCHRAN.

Subscribed and sworn to before me this the 27 day of August, 1917.

[Seal] G. J. LOMEN,
Notary Public in and for the Territory of Alaska.

(My commission expires on the 27 day of June, 1921.)

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants. Answer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 28, 1917. G. A. Adams, Clerk. By ———, Deputy. L. O. D. Cochran, Attorney for Defendants. [12]

In the District Court for the Territory of Alaska, Second Division.

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiff,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Reply.

Comes now the plaintiffs and for reply to defendant's answer filed herein, says:

I.

That plaintiffs deny each and every allegation contained in the affirmative defense of defendants.

FRED HARRISON,
Attorney for Plaintiffs.

Territory of Alaska,
Second Division,—ss.

Fred Harrison, being first duly sworn, on oath

deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing reply; knows the contents thereof, and the same is true as he verily believes.

FRED HARRISON.

Subscribed and sworn to before me this 22d day of September, 1917.

[Seal] W. C. McGUIRE,
Deputy Clerk for District Court, District of Alaska, Second Division. [13]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants. Reply. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 22, 1917. G. A. Adams, Clerk. By ————, Deputy. [14]

In the District Court, District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Judgment.

This cause coming on for trial this 22d day of September, 1917, at the hour of 2 o'clock P. M., before

the above-entitled court; the plaintiffs being represented by Fred Harrison, and the defendants by O. D. Cochran; upon motion of the plaintiffs for a judgment on the pleadings, and the Court being fully advised in the matter—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiffs, F. Umphrey and Fred Harrison, are the owners of that certain placer mining claim known as Creek Placer Mining Claim Number Five (5) Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska, and their title so far as the defendants are concerned is a title in fee; said placer mining claim being more particularly described as follows, to wit:

Commencing at Post No. 1 which is known as the Initial Stake, located at the southeasterly corner of claim, and northeast corner of creek claim No. 4 above West Fork of Willow Creek; running thence 1320 feet in a northerly direction to Post No. 2, thence running 660 feet in a westerly direction to Post No. 3, thence running 1320 feet in a southerly direction to Post No. 4, running thence 660 feet in an easterly direction to the initial post, or Post No. 1, the place of [15] beginning; location notice whereof is recorded in volume 5, at page 154 of the records of said Wade Hampton Recording District.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendants, Chris Betsch and Joe L. Jean, their agents, servants, lessees and employees are hereby restrained from in-

terfering in any way with the plaintiff in the free use and enjoyment of said Creek Placer Mining Claim No. 5 Above Discovery on the West Fork of Willow Creek, a tributary of Spruce Creek, in the Wade Hampton Recording District, Territory of Alaska;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the plaintiffs do recover of and from the defendants their costs of action taxed at the sum of $26.20.

Done in open Court, at Nome, Alaska, this 22d day of September, 1917.

J. R. TUCKER,
District Judge.

Recd. copy Sep. 22, 1917,

O. D. COCHRAN,
Atty. for Defts.

[Endorsed]: #2723. District Court, Alaska, Second Div. F. Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 22, 1917. G. A. Adams, Clerk. By A., Deputy. Orders and Judgments, Vol. 11, page 401, C. **[16]**

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that on the 22d day of September, 1917, the above-entitled court convened at Nome, Alaska, at the hour of eleven o'clock in the forenoon of said day; that the following proceedings were had in reference to the above-entitled action:

Mr. Fred Harrison, appearing on behalf of plaintiffs, announced to the Court that it was agreed between himself and counsel for the defendants that the reply of the plaintiffs to the answer of the defendants filed herein be deemed as a general denial of the new matter alleged in said answer as filed, and that such reply would be filed later, and asked that said case be set for trial.

O. D. Cochran, Esq., appearing as attorney for the defendants, opposed the setting of said case for trial until he could have time to secure the attendance of witnesses on behalf of the defendants, and the attendance of the defendants residing at Marshall, Alaska. After argument the case was set down for trial before the Court at the hour of two P. M. of

this 22d day of September, 1917. O. D. Cochran, on behalf of said defendants, objected to the setting of the trial of said case [17] at said time and excepted to the order of the Court setting said case for trial at said time, and an exception was allowed by the Court.

AND BE IT FURTHER REMEMBERED, that thereafter and at the hour of two P. M. on said day said court reconvened and the following proceedings were had:

O. D. COCHRAN, attorney for the defendants, presented a motion to postpone the trial of said action for a period of three weeks or until the defendants with their witnesses could reach Nome from the said town of Marshall, said motion being in writing and supported by the affidavit of O. D. Cochran, which said motion and affidavit is duly filed by the clerk of the above-entitled court in said cause. And in further support of said motion said attorney for the defendants offered in evidence Rule 37 of the above-entitled court, which said Rule 37 is as follows:

> "Rule 37. ASSIGNMENT DAY. The first day of every regular or special term of court and each Saturday in every term shall be assignment day. Whenever any case is at issue either party may serve upon the other a notice specifying that the same will be called up for hearing on assignment day for the purpose of fixing a time for the trial of the action. Such notice with acknowledgment or proof of service shall be filed with the clerk of this Court on or

before Wednesday previous to assignment day. Notice of assignment shall be substantially in the form fixed for the notice of hearing of demurrers and motions. Nothing in this rule shall prevent the action from being assigned for trial upon consent, or in term time, without notice; provided, that if a cause is not noticed for assignment for trial within thirty days after it is at issue, and ready for trial, the clerk will as a matter of course place it on the assignment calendar for the next succeeding assignment day for assignment by the Court for trial."

After argument by counsel for the defendants and plaintiffs upon said motion to postpone said trial, said motion was by the Court overruled, and to the overruling of which said motion the defendants excepted and an exception was allowed by the Court. [18]

Thereupon Mr. Fred Harrison, Esq., appearing as attorney for plaintiffs, read to the Court the complaint, answer and reply, and orally moved the Court for a judgment in favor of the plaintiffs upon the pleadings, which said motion for judgment upon the pleadings was, by the Court and over the objections of the defendants, allowed, and findings of fact and decree ordered presented in accordance with such order, to which ruling of the Court the defendants duly excepted and an exception was allowed by the Court.

That thereafter and on the same day, and at the hour of five P. M., said above-entitled court convened specially, and Mr. Fred Harrison presented

to the Court a written judgment which was signed by the Court and filed in the said above-entitled court and cause, and an exception to the signing and filing of said judgment was duly allowed to the defendants by the Court.

And now, in furtherance of justice and that right may be done in the premises, the defendants present the foregoing Bill of Exceptions and pray that the same may be settled and allowed.

O. D. COCHRAN,
Attorney for Defendants.

The foregoing proposed Bill of Exceptions having been served, filed and presented as required by law, and being full, true and correct, is hereby settled and allowed.

Done in open court this 29 day of September, 1917.

J. R. TUCKER,
District Judge.

Service of the above and foregoing Bill of Exceptions acknowledged by receipt of copy, this 29 day of September, 1917.

HUGH O'NIEL,
Attorney for Plaintiffs. [19]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By ————, Deputy. D. O. D. Cochran, Attorney for Defendants. [20]

In the District Court for the Territory of Alaska, Second Division.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Motion for Postponement of Trial.

Come now the defendants and move the Court for a postponement of the date of the trial of the above-entitled action which was set by the Court on this day, for the hour of two o'clock in the afternoon of this the 22d day of September, 1917, on account of the absence of each of the defendants from Nome and the absence of their witnesses material to the defense of the defendants in the above-entitled action; and on account of the utter impossibility of the defendants to secure the attendance of their witnesses or to be present at the time set for the trial of said action.

The defendants move the Court to postpone the date and hour set for the trial of said action for a period of three weeks or for such a period of time as will enable the defendants and their witnesses to reach Nome, the place set for the trial of said action, from their residence which is at Marshal or Fortuna Ledge, in the Wade Hampton Precinct on the Yukon River about six hundred miles distant from the town of Nome where said case is set for trial by an order

of the Court made at five minutes before the hour of twelve o'clock noon of this day. [21]

This motion is made and based upon the pleadings, records and files in the above-entitled action, and upon the affidavit of O. D. Cochran, the attorney for the defendants, hereto attached.

This motion is not made for delay merely, but in order that said case may be set for trial upon a date when it will be possible for the defendants and their witnesses to be present at such trial, and that justice may be done in the premises and the defendants have an opportunity to present to the court their defense to said action.

Dated this the 22d day of September, 1917.

O. D. COCHRAN,
Attorney for Defendants. [22]

In the District Court for the Territory of Alaska, Second Division.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Affidavit of O. D. Cochran for Postponement of the Date of Trial.

United States of America,
Territory of Alaska,—ss.

O. D. Cochran, being duly sworn, deposes and

says: That he is the attorney for the defendants in the above-entitled action; That said action involves the title to a placer mining claim known as No. 5 Above Discovery on the West Fork of Willow Creek, Territory of Alaska, in the Wade Hampton Recording District, Territory of Alaska.

That each of the defendants in said action reside at Marshal or Fortuna Ledge in the said Wade Hampton Precinct, Territory of Alaska, near said mining claim.

That said Marshal or Fortuna Ledge is situated on the Yukon River about six hundred miles distant from the town of Nome; that the means of travel from said Marshal to Nome is by river steamboat coming down the Yukon River to St. Michaels and by Ocean Vessel from St. Michaels to Nome, that the steamboats plying up and down the said Yukon River are irregular and vessels from said St. Michaels to Nome are also irregular and that it would require from ten days to three **[23]** weeks under the usual condition of travel prevailing, to reach Nome from said Marshal or Fortuna Ledge.

That the above-entitled court convened in the courthouse at Nome, Alaska, at the hour of eleven o'clock in the forenoon on the 22d day of September, 1917; that after the convening of said court Mr. Fred Harrison, one of the plaintiffs in the above-entitled action, and the attorney for the plaintiffs, appeared in court and asked the court to have the said above-entitled action set down for trial; that affiant, as attorney for the defendants, stated in open court and to the court that the defendants resided at the said

Marshal or Fortuna Ledge, and witnesses for the defendants also resided at Marshal or Fortuna Ledge, and that the defendants could not go to trial in said action until such time as they might reach Nome from said Marshal or Fortuna Ledge, and bring their witnesses here.

That said Fred Harrison insisted upon an immediate trial and the Court set the same for trial at the hour of two o'clock of said 22d day of September, 1917; that affiant stated to the Court at such time that the defendants could not possibly go to trial at two o'clock in the afternoon of said day on account of the absence of said defendants and their witnesses; also called the attention of the Court to the fact that said case was not at issue, and that no reply had been filed to the answer filed by the defendants, and affiant thereupon moved the Court for a judgment of dismissal of the action upon the pleadings, that is, the complaint and answer. That thereafter and five minutes before the hour of twelve o'clock noon of the same day, and during all of which time said court was in session, the plaintiff Fred Harrison served affiant, as attorney for the said [24] defendants, with a reply to the answer of the defendants, and thereafter filed the same in said court; and that said case was not at issue until the filing of said reply five minutes before said hour of twelve o'clock noon of said day.

That affiant is an attorney of said court duly admitted to practice therein, and has been practicing before said court for a great number of years.

That it is utterly and physically impossible for the

defendants to be present or to have their witnesses present at the time fixed for the trial of said action.

That by the order of the Court setting said case for trial at the hour of two o'clock in the afternoon of the 22d day of September, 1917, the defendants were given less than three hours in which to secure the attendance of their witnesses at the trial of said action, or to be present thereat themselves.

That no subpoenas have been issued for witnesses on behalf of the defendants, for the reason that it is physically impossible that they could be served or that such witnesses could be present at the time fixed for said trial.

Affiant further says that it is utterly and physically impossible for him, on behalf of said defendants, to make any defense to said action at the time fixed for the trial thereof as aforesaid, and that to compel the defendants to go to trial at the time and hour fixed by the court for such trial would be a denial to the defendants of any opportunity whatever to defend said action.

That affiant has been advised by the said defendant Jean, of the defense to said action, and affiant believes that the defendants have a good and substantial defense to said action on the merits. [25]

That said property involved in said action, as affiant is informed by said defendant Jean, is of the value of several thousands of dollars.

That the facts which the defendants will testify to at the trial of said action are not cumulative and cannot be proven or shown by anyone else to the knowledge of affiant.

That affiant has had less than two hours in which to prepare this motion and affidavit, so as to present the same before the hour set for the trial of said action.

That the defendants expect to prove by their own evidence and the evidence of other witnesses, who are now at the said marshal that they were in the actual possession of the premises described in plaintiff's complaint, upon the date of the commencement of this action, and that the plaintiff's nor neither of them were in the possession of the same upon the date of the commencement of this action.

That during the year 1916 the defendants expended upon said placer mining claim in working and operating the same, several thousands of dollars.

That the said defendants were, ever since and long before the 1st day of January, 1917, and upon the date the plaintiffs claim to have located the premises described in plaintiffs' complaint, in the actual possession of the whole of said placer mining claim with the boundaries thereof during all of said period distinctly marked, and that the said premises were not open for location upon the date that the plaintiffs claim to have located the same.

That the defendants are the owners of said placer mining claim by reason of a valid mining location thereof made by their predecessors in interest.

That this motion is not made for delay merely but [26] that the defendants may have an opportunity to appear and defend said action, and that justice may be done to them in the premises.

O. D. COCHRAN.

Subscribed and sworn to before me this the 22d day of September, 1917.

G. A. ADAMS,
Notary Public in and for the District of Alaska.
Clerk of Court.

(My commission expires on the —— day of ——.)

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. F. Umphrey, Plaintiff, vs. Chris Betsch, Defendant. Motion. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome, Sep. 22, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for ————. [27]

UNITED STATES OF AMERICA.

District Court, District of Alaska, —— Division.

Cause No. ——.

T. UMPHREY et al.,

Plaintiffs,

vs.

CHRIS BETSCH et al.,

Defendants.

Praecipe for Entry of Appearance for Plaintiff.

To the Clerk of the Above-entitled Court:

You will please enter my name as atty. of record on behalf of plaintiff.

HUGH O'NEILL,
Atty. for Pltf.

NOTICE.—Attorneys will please indorse their own filings. Rule 47. **[28]**

[Endorsed]: Cause No. 2723. District Court, District of Alaska, 2d Division. F. Umphrey et al., Plaintiffs, vs. Chris Betsch, Defendant. Praecipe. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 27, 1917. G. A. Adams, Clerk. By ————, Deputy.

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Petition for an Order Allowing an Appeal.

Come now the defendants Chris Betsch and Joe L. Jean, and feeling themselves aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 22d day of September, 1917, in favor of the plaintiffs and against the defendants, they hereby appeal from said final judgment and decree and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings upon which the said judgment and

decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said appellants further pray for an order fixing the amount of a cost and supersedeas bond to be given by said appellants upon said appeal, and upon the giving of said supersedeas bond the execution of said judgment and further proceedings in this court, upon said judgment, be superseded and stayed.

Dated at Nome, Alaska, this 29 day of September, 1917.

O. D. COCHRAN,
Attorney for Defendants. **[29]**

Service of the above and foregoing petition for an order allowing appeal, acknowledged by receipt of a copy thereof this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiffs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Petition for an Order Allowing an Appeal. Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By ————, Deputy. D. O. D. Cochran, Attorney for Defendants. **[30]**

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Order Allowing Appeal (and Fixing Supersedeas Bond).

Upon motion of O. D. Cochran, Esq., attorney for defendants, Chris Betsch and Joe L. Jean, it is

ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree heretofore filed and entered herein on the 22d day of September, 1917, be, and is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations, motions, orders and all proceedings herein, be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that a bond be given by the defendants to the plaintiffs in the sum of Five Hundred Dollars, which bond shall operate as a supersedeas.

Done in open court this 29 day of September, 1917.

J. R. TUCKER,
District Judge.

Service of the above order admitted by receipt of copy this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiff.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order Allowing Appeal (and Fixing Supersedeas Bond). Filed in the office of the clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By ————, Deputy. D. O. D. Cochran, Attorney for Defendants. Orders and Judgments, Vol. 11, page 402. C. **[31]**

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Assignment of Errors.

Come now the defendants and assign the following errors upon which they will rely in prosecuting their said appeal to the Circuit Court of Appeals for the Ninth Circuit.

I.

That the Court erred and abused its discretion in

making its order of the 22d day of September, 1917, setting the trial of said action for the hour of two o'clock in the afternoon of said day, and without giving defendants or their witnesses an opportunity to be present at said time fixed and set by the Court for the trial thereof.

II.

That the Court erred and abused its discretion in overruling and denying the motion of the defendants to postpone the trial of said action.

III.

That the Court erred in granting the motion of the plaintiffs for judgment in favor of the plaintiffs upon the pleadings filed in said cause, and directing the judgment entered in favor of the plaintiffs upon said pleadings, over the objections of the defendants. [32]

IV.

That the Court erred in making, signing and filing its final decree in favor of the plaintiffs and against the defendants, over the objections and exceptions of the defendants.

WHEREFORE said defendants pray that the said judgment of said District Court for the District of Alaska, Second Division, be reversed and set aside.

O. D. COCHRAN,
Attorney for Defendants.

Due service of the within assignment of errors is hereby acknowledged at Nome, Alaska, by receipt of copy thereof, this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiffs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sept. 29, 1917. G. A. Adams, Clerk. By ————, Deputy. D. O. D. Cochran, Attorney for Defendants. [33]

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Chris Betsch and Joe L. Jean, as principals, and L. A. Sundquist and Geo. S. Maynard, as sureties, are held and firmly bound unto the plaintiffs Fred Umphrey and Fred Harrison, above named, in the sum of Five Hundred Dollars, to be paid to the said plaintiffs, Fred Umphrey and Fred Harrison, their heirs or assigns, to the payment of which well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 29 day of September, 1917.

The condition of the above undertaking and obligation is that,

WHEREAS, the above-named defendants Chris Betsch and Joe L. Jean, have filed their petition for an appeal, and have taken an appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and decree in the above-entitled cause, rendered by the [34] United States District Court for the District of Alaska, Second Division, and

WHEREAS, the said defendants desire to secure the plaintiffs in the payment of their costs, and their costs on appeal, and desire to have execution of said judgment and all other proceedings in said action superseded and stayed pending the final determination of said action on appeal;

NOW, THEREFORE, if the above-named defendants, Chris Betsch and Joe L. Jean, shall prosecute the said writ to effect and answer all costs and damages, if they fail to make good their plea, and shall pay or cause to be paid to the said plaintiffs, their executors, administrators or assigns, all damages which they shall suffer by reason of such supersedeas and stay of execution, if the same should be wrongful and without sufficient cause, then this obli-

gation shall be void; otherwise to remain in full force and effect.

CHRIS BETSCH,
JOE L. JEAN,
By O. D. COCHRAN,
Their Attorney,
Principals.
L. A. SUNDQUIST,
GEO. S. MAYNARD,
Sureties.

United States of America,
Territory of Alaska,—ss.

L. A. Sundquist and Geo. S. Maynard, being first duly sworn, each for himself, deposes and says: I am one of the sureties named in the above undertaking and am a resident of the District of Alaska; that I am not an attorney [35] at law, marshal, deputy marshal, clerk of any court or other officer of any court, and am worth the sum of Five Hundred Dollars, in property exempt from execution, over and above all just debts and liabilities.

L. A. SUNDQUIST.
GEO. S. MAYNARD.

Subscribed and sworn to before me this the 29 day of September, 1917.

[Seal] O. D. COCHRAN,
Notary Public in and for the Territory of Alaska.
(My commission expires on *the* Aug. 4, 1919.)

Order (Approving Supersedeas Bond).

The above and foregoing *supersedeas* and cost bond is hereby approved this 29th day of September,

1917, and execution and all further proceedings in said action are superseded and stayed pending the final determination of this action.

J. R. TUCKER,
District Judge.

The foregoing bond is satisfactory as to form and sureties.

HUGH O'NEILL,
Atty. for Plfs.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Undertaking and Order (Approving Supersedeas Bond). Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 29, 1917. G. A. Adams, Clerk. By ————, Deputy. D. O. D. Cochran, Attorney for Defendants. [36]

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Order Extending Time to December 31, 1917, to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of O. D. Cochran, attorney for the defendants in the above-entitled action, it is hereby ordered that the time for filing and docketing the transcript and records on the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to the 31st day of December, 1917.

Done in open court this 26th day of October, 1917.

J. R. TUCKER,
District Judge.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1917. G. A. Adams, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendant. Orders & Judgments, Vol. 11, page 419. C. [37]

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Order Extending Time to March 1, 1918, to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of O. D. Cochran, attorney for the defendants in the above-entitled action, it is hereby ordered that the time for filing and docketing the transcript and records on the appeal in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to the 1st day of March, 1918.

Done in open court this 22d day of December, 1917.

WM. A. HOLZHEIMER,
District Judge.

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey et al., Plaintiffs, vs. Chris Betsch et al., Defendants. Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 22, 1917. Thos. McGann, Clerk. By W. C. McG., Deputy. O. D. Cochran, Attorney for Defendants. [38]

In the District Court for the District of Alaska, Second Division.

No. 2723.

F. UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Thos. McGann, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 42, both inclusive, are a true and exact transcript of the Complaint, Summons, Answer, Reply, Judgment, Bill of Exceptions, Motion for Postponement of Trial, Praecipe for Appearance of Hugh O'Neill, attorney for plaintiffs, Petition for an Order Allowing an Appeal, Order Allowing Appeal and Fixing Supersedeas Bond, Assignment of Errors, Undertaking, Orders Extending Time to File and Docket Transcript, in the case of F. Umphrey and Fred Harrison, plaintiffs, vs. Chris Betsch and Joe L. Jean, Defendants, No. 2723 this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript $14.75, paid by O. D. Cochran, attorney for defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 22d day of December, A. D. 1917.

[Seal] THOS. McGANN,
Clerk. **[39]**

In the District Court for the District of Alaska, Second Division.

FRED UMPHREY and FRED HARRISON,
Plaintiffs,

vs.

CHRIS BETSCH and JOE L. JEAN,
Defendants.

Citation on Appeal.

United States of America,
Territory of Alaska,—ss.

The President of the United States of America, to Fred Umphrey and Fred Harrison, Plaintiffs, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this Citation, on the 28 day of October, A. D. 1917, pursuant to an order allowing appeal entered in the office of the clerk of the United States District Court, District of Alaska, Second Division, from the final decree and judgment filed

and entered therein on the 22d day of September, 1917, in that certain suit wherein you, the said Fred Umphrey and Fred Harrison, are plaintiffs and Chris Betsch and Joe L. Jean are defendants, to show cause, if any there be, why the said final decree and judgment rendered against said defendants as in said order allowing appeal [40] mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 29 day of September, A. D. 1917, and of the Independence of the United States the one hundred and forty-second.

[Seal] J. R. TUCKER,
District Judge.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office, at Nome, Alaska, this 29 day of September, A. D. 1917.

G. A. ADAMS,
Clerk of the United States District Court, for the District of Alaska, Second Division.

Service of the above and foregoing Citation acknowledged by receipt of copy this 29 day of September, 1917.

HUGH O'NEILL,
Attorney for Plaintiffs. [41]

[Endorsed]: No. 2723. In the District Court for the District of Alaska, Second Division. Fred Umphrey and Fred Harrison, Plaintiffs, vs. Chris Betsch et al., Defendants. Citation. [42]

[Endorsed]: No. 3123. United States Circuit Court of Appeals for the Ninth Circuit. Chris Betsch and Joe L. Jean, Appellants, vs. Fred Umphrey and Fred Harrison, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Filed February 18, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

BRIEF FOR APPELLANTS.

WILLIAM A. GILMORE,
O. D. COCHRAN,
Attorneys for Appellants.

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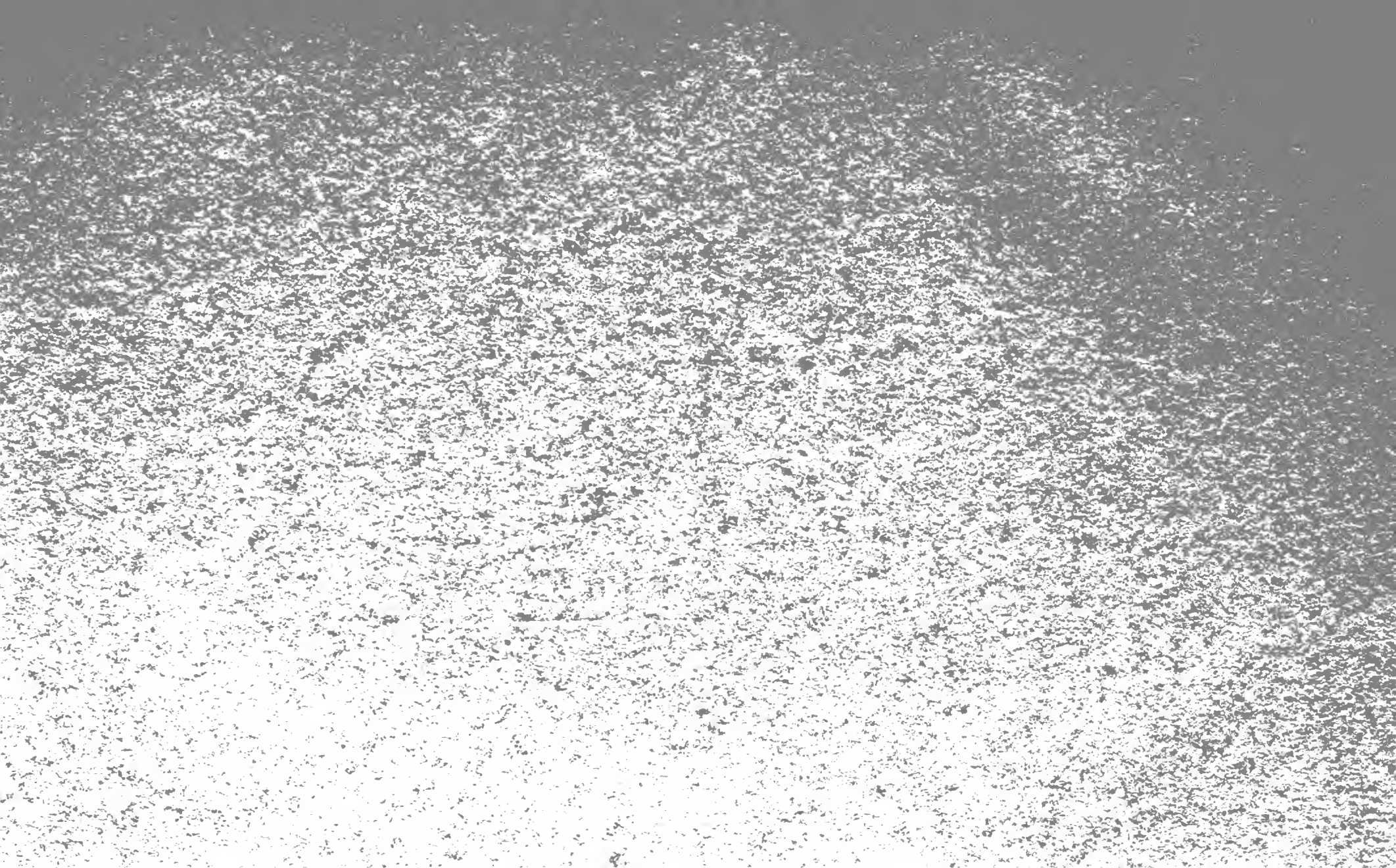

No. 3123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is a suit involving the title and ownership of a certain placer mining claim described as Creek Placer Mining Claim No. 5, Above Discovery on the west fork of Willow Creek, a tributary of Spruce Creek, a tributary of the Yukon River, in the Wade Hampton recording district, Territory of Alaska.

The plaintiffs in the court below (the appellees herein), claim the placer ground in controversy in their complaint (Tr. pp. 1, 2, 3, 4, 5, 6 and 7), by reason of a certain alleged placer location made by one of the plaintiffs on the first day of April, 1917, by virtue of a discovery of gold and the staking of

the placer ground, and a subsequent filing for record of a certificate of location of said ground, and further allege that by reason of said placer location so made on the first day of April, 1917, they are entitled to the possession and in the possession of the placer ground.

The appellees' complaint was verified on the 11th day of April, 1917 (Tr. p. 7), just eleven days after the alleged location was made and said complaint was thereafter filed in the office of the clerk of the District Court at Nome, Alaska, on the 3rd day of May, 1917 (Tr. p. 8). The summons and complaint in the suit were served on the defendants, respectively, on the 15th and 18th days of June, 1917, as shown by the marshal's return (Tr. p. 9).

Thereafter and on the 27th day of August, 1917, the defendants in the court below (the appellants herein), filed their answer to the appellees' complaint (Tr. pp. 10, 11 and 12), wherein they denied each and every material allegation contained in the appellees' complaint and affirmatively plead that they were the owners in fee of the mining ground and premises described in appellees' complaint, and that they were in the possession and entitled to the possession of the whole thereof.

Subsequently on the 22nd day of September, 1917, without issue being joined, Mr. Fred Harrison, one of the appellees, who is an attorney at law and of record in the case as attorney for plaintiffs in the court below (Tr. p. 17), appeared in open court and asked that said case be set for trial. There-

upon, Mr. O. D. Cochran, who was in the court room, opposed the setting of said case for trial until he could have time to secure the attendance of witnesses on behalf of the appellants and until he could secure the attendance of the appellants who resided at Marshall, Alaska, some six hundred miles distant. Thereupon, Mr. Cochran moved for judgment on the pleadings for failure on the part of the appellees to file their reply to the answer of appellants and on the ground that said case was not at issue. Immediately thereafter Mr. Harrison filed a reply for the appellees and issue was joined in said cause. The court thereupon set the case for trial before the court at the hour of 2 o'clock P. M. on the same day, September 22nd, 1917, over the objection of Mr. Cochran on behalf of appellants (Tr. pp. 18, 23 and 24).

When the court convened at the hour of 2 o'clock in the afternoon of September 22nd, 1917, Mr. Cochran, on behalf of the appellants, filed a written motion for a postponement of the trial (Tr. p. 21) until such time as he could inform his clients and bring them and their witnesses to Nome from said town of Marshall. In support of the written motion, Mr. Cochran filed his own affidavit (Tr. pp. 22, 23, 24, 25 and 26), wherein he set up the facts that said cause had just been brought to issue on that morning and had not been called up for assignment in accordance with the regular rules of court; that his clients, the appellants herein, lived at the town of Marshall or Fortuna Lodge in the

Wade Hampton Precinct, Territory of Alaska, on the Yukon River, about six hundred miles distant from the town of Nome; that the means of travel from said town of Marshall to Nome is by river steamboat, coming down the Yukon River to St. Michaels and by ocean vessel from St. Michaels to Nome; that the steamboats plying up and down the Yukon River are irregular, and vessels from said St. Michaels to Nome are also irregular and that it would require from ten days to three weeks time under the usual conditions of travel prevailing, to get his clients and witnesses to Nome to attend the trial; that in the two hours elapsing between the time of setting the case and the hour of going to trial it was physically impossible for the appellants to be present or to have their witnesses present to take part in the trial; that between the hour of 11 o'clock in the morning and 2 o'clock, the hour set for said trial, no subpoenas had been issued for the witnesses because it was physically impossible to serve the witnesses who lived at such a great distance from Nome; that owing to the short time between the time of setting said trial and the hour for the trial it was physically impossible for the attorney for appellants to make any defense to the action; that his clients had a good and substantial defense to the cause of action set out in appellees' complaint; that the property involved in the suit was of the value of several thousand dollars; that he had no other witnesses to prove his defense other than his clients and those witnesses whom they

would bring from Marshall; that by his clients and their witnesses they expected to prove that they were in the actual possession of the premises described in the appellees' complaint upon the date of the commencement of the action and that the plaintiffs, nor either of them, were in the possession of the same upon the date of the commencement of the action; that during the year 1916, the defendants expended upon said placer mining claim in working and operating the same, several thousand dollars; that the appellants were ever since and long before the first day of January, 1917, and upon the date the appellees claim to have located the premises described in their complaint, in the actual possession of the whole of said placer mining claim with the boundaries distinctly marked, and that the premises were not open for location upon the date that the appellees claim to have located the same; that his clients, the appellants, are the owners of the placer mining claim by reason of valid mining location.

After the motion and affidavit were read and argued, the court denied the appellants' motion for a postponement of the trial and immediately began the trial of said cause. Whereupon, the appellees through Mr. Harrison, as their attorney, read to the court the complaint, answer and reply (Tr. p. 19), and orally moved the court for a judgment in favor of the appellees upon the pleadings, which said motion for judgment upon the pleadings was by the court and over the objection of the attorney

for appellants, allowed, and thereafter on the same day at the hour of 5 o'clock (Tr. pp. 19 and 20), over the objection of the attorney for appellants, the trial court made its findings of fact and conclusions of law and entered a written judgment (Tr. pp. 14, 15 and 16) in favor of the appellees and against the appellants for the ownership and possession of said placer mining claim and enjoined the defendants from interfering with the plaintiffs' use and possession.

Specifications of Error.

1. The court erred and abused its discretion in making its order of the 22nd day of September, 1917, setting the trial of said action for the hour of 2 o'clock in the afternoon of said day and without giving appellants or their witnesses an opportunity to be present at said time fixed and set by the court for the trial thereof (Assignment of Error No. 1).

2. The court erred and abused its discretion in overruling and denying the motion of the appellants to postpone the trial of said action (Assignment of Error No. 2).

3. The court erred in granting the motion of the appellees for judgment in favor of the appellees upon the pleadings filed in said cause, and directing the judgment entered in favor of the appellees upon said pleadings, over the objections of the appellants (Assignment of Error No. 3).

4. The court erred in making, signing and filing its final decree in favor of the appellees and against the appellants, over the objections and exceptions of the appellants (Assignment of Error No. 4).

Argument and Authorities.

The record in this case is very short and easily comprehended. The property involved, however, according to the record is a valuable mining claim in the Wade Hampton mining precinct on the Yukon River in Alaska. Enough facts are shown in the transcript to show the court that the appellants were the owners of the placer claim and had been mining it on a large scale, expending several thousand dollars on the claim in the year 1916; that the appellees on the first day of April, 1917, attempted to make a location of the same claim, recording their location certificate on the 2nd day of April and on the same day one of the plaintiffs, Umphrey, transferred an undivided half interest in the location to the other plaintiff, Fred Harrison. Thereafter, nine days later, on the 11th of April, without hardly waiting until their location got cold, they commenced this action by verifying their complaint and sending it to the clerk's office at Nome, where it was filed on the 3rd day of May. This will give the court a fair idea of the time it takes to travel between the distant town of Marshall on the Yukon River and the Town of Nome. After the case was docketed on the 3rd day of May, the papers

were sent back to Marshall for service on the defendants and according to the United States marshal's return, the summons and complaint were not served until the 15th and 18th days of June, or nearly a month and a half after the date of docketing the case. The transcript shows that the only means of communication between the two towns are by river steamer from Marshall to St. Michaels, which is slow and irregular and by ocean steamer from St. Mitchaels across to Nome, also an irregular mode of travel.

After preliminary motions had been disposed of, the record shows the defendants served and filed their answer on the 27th day of August, 1917. Nothing further was done in the matter until a month later when on the 22nd day of September, one of the plaintiffs, Mr. Fred Harrison, who was the attorney of record in the case for himself and his co-plaintiff, appeared in open court before he had filed any reply to bring the case to issue, and orally requested the court to set the cause for trial. The transcript shows that Mr. Cochran was present in court and called the court's attention (Tr. p. 18), to rule 37 of the District Court, for the District of Alaska, governing the assignment of causes for trial. For some unknown reason, not disclosed in the transcript, the trial court totally ignored the rule and further ignored the request of Mr. Cochran for a reasonable date for the trial and promptly set the case for trial less than three hours away at the hurried hour of 2 o'clock in the afternoon of the same day.

At the time the court fixed the hour of trial for 2 o'clock for that day, the court was informed of the fact that Mr. Cochran's clients and his witnesses were more than six hundred miles distant from the court and could not possibly attend the trial. Notwithstanding these facts, the court arbitrarily set the cause for trial for 2 o'clock of September 22nd. The record shows that when the court convened at the hour of 2 o'clock, Mr. Cochran presented a written motion, supported by his own written affidavit, setting forth in detail the history of the case and requesting a reasonable postponement of the trial for three weeks until he could get his clients and their witnesses to Nome to attend the trial. This motion was arbitrarily and promptly overruled and denied by the court, and the trial of the cause was ordered begun by the court. Mr. Harrison, then on behalf of his clients, read the complaint, answer and reply and orally moved the court for a judgment on the pleadings which the court promptly granted over the objection of Mr. Cochran for the appellants.

We submit there is not the slightest reason given anywhere in the transcript for such arbitrary and unjust rulings made by the trial court in this cause. The court certainly abused its discretion, first, in making the order contrary to the rule of the District Court, setting the cause for trial less than three hours away when fully informed of the predicament of appellant's counsel in not having his clients and witnesses in Nome and in not having any

opportunity or any reason for having them in Nome, as the cause had not been theretofore set for trial, and second, in overruling and denying appellants' motion to postpone the trial.

The court also erred first, in granting the motion of the appellees for judgment in favor of the appellees upon the pleadings and, second, in making and filing its final decree in favor of the appellees and against the appellants.

ABUSE OF DISCRETION.

(Assignments of Error Nos. 1 and 2.)

When we speak of discretion here, we have in mind a judicial discretion which measures right from wrong, giving justice between litigants rather than injustice, and not a capricious exercise of judicial power to oppress a litigant. The record shows that on September 22nd, 1917, the case was not at issue. It was not called up for setting according to the usual rules of the trial court. Prior to that date it was impossible for appellants to get out subpoenas or to leave their usual occupations and places of abode at the town of Marshall on the Yukon River to come to Nome. The question of due or reasonable diligence on the part of the appellants was not involved, for they had no way of knowing when their case would be called or set for trial prior to September 22nd. It was a most unusual, unjust, arbitrary and capricious ruling to say the least.

With the title, ownership and right of possession of a very valuable Alaskan placer mining claim involved, the trial court at the noon hour, set the case for trial at 2 o'clock in the afternoon of the same day with the appellants and their witnesses six hundred miles away and no previous notice or warning that the oral motion would be made on behalf of the appellees for setting the case on that day. It amounted to the denial of the use of subpoena. Such an abuse of judicial discretion is rarely found in the books!

> "It is a general rule that the granting or refusing of a motion for continuance is in the sound discretion of the trial court; and that an appellate court will not interfere with the exercise of this discretion unless the action of the trial court is plainly erroneous and is a clear abuse of its discretion. However, the discretion of the trial court in this respect is not an arbitrary, but a judicial, discretion, governed and controlled by legal rules, and to be exercised with a view to the manifest rights of the parties and the prevention of injustice and oppression, and in this sense it is subject to revision. It has been stated that, where a continuance is a matter of common right, a disregard of the right by refusing a continuance would constitute an abuse of discretion."
>
> 13 Corpus Juris, p. 125.

> "The absence of witnesses or evidence is the most usual ground on which a motion for a continuance is based, and whether or not a continuance shall be allowed on this ground is very largely in the discretion of the court. However, it is commonly regarded as error, or as frequently stated, an abuse of discretion,

to deny a continuance when the application complies with every requirement of the law and is not made merely for delay."

13 Corpus Juris, 149;

Lord v. Dunster, 79 Cal. 477 (21 Pac. 865);

Linn County v. Morris (Or.), 69 Pac. 297;

Betts Spring Co. v. Jardine Mach. Co., 139 Pac. 657.

This latter case is a California case and the court held that it was an abuse of discretion in the trial court to refuse a continuance where the showing was undisputed that the defendant was out of the country for his health, but would return in two months and was the only witness to prove his case.

This view is amply supported by the following cases:

Jaffe v. Lilienthal, 35 Pac. 636;

McMahan v. Norick, 69 Pac. 1047;

Storer v. Heitfeld et al., 105 Pac. 55.

The application for the continuance by appellants between the morning and afternoon sessions of the court was timely and the only opportunity they had for presenting a motion for continuance after objecting to the time of trial.

9 Cyc., 134;

6 R. C. L. 562.

"Where there has been a very capricious exercise of power or a very flagrant case of injustice, the appellate court will intervene."

9 Cyc., 147;

Watts v. Cohn, 40 Ark. 114;

10 Cent. Dig. tit. "Continuance", Sec. 141.

"The general rule is that, while the power of a court to grant or refuse a continuance is a discretionary power, this discretion is to be exercised in a sound and legal manner and not arbitrarily or capriciously."

6 R. C. L. 546;

Notes: 67 Am. Dec. 639;

74 Am. Dec. 141.

"A court cannot, therefore, refuse a continuance where the ends of justice clearly require it; but if an abuse of discretion clearly appears, its ruling will be reversed."

6 R. C. L. 546.

"To guard against bad faith and unwarranted delays, however, the following requirements have been established: (1) The expected testimony must be competent and material; (2) it must not be merely cumulative as impeaching; (3) it must be creditable and there must be a probability that it will affect the result; (4) There must be a probability that the testimony can be obtained at a future trial; and (5) due diligence must have been exercised to secure the attendance of the absent witnesses. The action of the lower court will not be interfered with unless these requirements are met, but if all these appear and the application is not made for purposes of delay it is an abuse of discretion to deny the motion."

6 R. C. L. 556.

The Compiled Laws of Alaska permit the court in its discretion, to postpone a trial on the ground of the absence of witnesses.

Sec. 1001 of the Compiled Laws of Alaska, page 425, provides as follows:

> "A motion to postpone a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and a statement of facts showing that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. The court, when it allows the motion, may impose such conditions or terms upon the moving party as may be just."

We submit the court exercised its authority erroneously and abused its judicial discretion in not postponing the trial until such a date that the defendants could reach the place of trial with their witnesses.

ERROR IN GRANTING JUDGMENT ON PLEADINGS.

(Assignments of Error Nos. 3 and 4.)

All the material allegations of the complaint are denied in the answer. The location, discovery of gold, staking and marking the boundaries, and the possession of plaintiffs, are all denied specifically. On the other hand, the appellants affirmatively plead possession and ownership of the mining ground in controversy in themselves. Notwithstanding these issues, the trial court without listening to a syllable of evidence in support of the contested

issues, promptly gave the appellees a judgment on the pleadings. About the only comment one is led to make in reflecting on the rulings of the court, is that the trial court was consistent in its arbitrary and unjust rulings all that day in the case. The appellees seemed to think because they alleged in their complaint the filing of the affidavit by William Delbar which was admitted by the answer, that this entitled them to a judgment on the pleadings. They relied upon Chapter 10, Session Laws of Alaska, 1915, which act provided for the filing of an affidavit of proof of annual assessment work not later than ninety days after the close of the calendar year in which the work was done.

Even if we admit for the sake of argument, that such a law was valid and constitutional, before the appellees were entitled to a judgment for the title and possession of the ground in controversy, they must prove by competent evidence that they made a location including discovery of gold, the marking of boundaries, etc., before the appellants had filed the affidavit of proof of annual assessment work, as the same law provides that such may be done. We contend, however, that the allegation in the complaint of the filing of the affidavit by William Delbar on behalf of the appellants was wholly immaterial so far as deciding or determining this appeal is concerned. The trial court in order to give and grant the appellees a judgment on the pleadings, found, without any evidence, that the appellees made a discovery of gold, marked the boundaries of

the claim with stakes and that they were in possession of the same. All of these matters were denied in the answer and were issues that could only be substantiated or proven by evidence.

A judgment on the pleadings will not stand where there is a material issue of fact joined or tendered. This is the universal rule of the courts in determining whether or not error has been committed in granting a judgment on the pleadings in any case.

> "This is a form of judgment not infrequently used in practice under the Reform Codes of Procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undecided all the material facts stated in the complaint. But such a judgment cannot be given where the pleadings of the defendants set up a substantial and issuable defense."
>
> 23 Cyc., 769.

This doctrine is supported by the following authorities:

> Prost v. Moore, 40 Cal. 347;
>
> Alspaugh v. Reid, 55 Pac. 300;
>
> Parker v. Des Moines Life Association, 78 N. W. 826;
>
> Lewis v. Foard, 17 S. E. 9;
>
> Lough v. Thornton, 17 Minn. 253;
>
> Nelson v. Grondahl, 96 N. W. 299.

> "In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the plead-

ings, based on the facts thereby conceded, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. Where issue is joined upon a single material proposition a judgment on the pleadings is improper."

15 Ruling Case Law, Sec. 13, p. 579.

Also in support see

Mills v. Hart, 52 Pac. 68;

Norris v. Lilly, 82 Pac. 425.

"A motion by one party for judgment upon the pleadings after issue is joined will be denied if his adversary's pleadings are sufficient in substance to sustain a judgment in his favor."

Rice v. Bush, 16 Colorado 484;

Iba v. Central Association (Wyo.), 40 Pac. 527.

A judgment on the pleadings is only proper in cases where the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced. Judgment on the pleadings cannot, however, be properly rendered where the answer denies any material allegation of the complaint.

The above general doctrine is supported by the following authorities:

Martin v. Porter, 84 Cal. 476;

Johnson v. Manning, 2 Idaho, 1074;

Doyal v. Landis, 119 Ind. 479;
McCrea v. Leavenworth, 46 Kan. 747;
Floyd v. Johnson, 17 Mont. 469;
McCready v. Dennis, 85 Pac. 531;
Floyd v. Ballantine, 45 N. Y. S. 809; 20 Misc. Rep. 141;
Willis v. Holmes, 28 Or. 265;
Laubach v. Myers, 147 Pa. St. 447;
Raymond v. Morrison, 9 Wash. 156;
Jones v. Rowley, 73 Fed. 286.

"Where, in an action to quiet title an affirmative defense in defendant's answer, and also his cross-complaint, set up title in him and constitute a complete defense to plaintiffs' claim, the fact that defendant's denials are insufficient does not entitle plaintiff to judgment on the pleadings."

McCroskey v. Mills, 75 Pac. 910.

"It is error to render judgment for plaintiff on the pleadings where material allegations of the petition are denied by answer."

Haworth v. Newell, 71 N. W. 404; 102 Ia. 541;
For further cases see Am. Dec. Dig., Sec. 345, p. 610.

In conclusion we submit that the transcript in this case shows conclusively that the trial court capriciously abused its judicial discretion in denying the appellants a reasonable time to reach Nome to attend the trial of their case. We further contend that the court unjustly erred in granting the

appellees a judgment on the pleadings which ousted the appellants from possession of their valuable mining claim and enjoined them from interfering with the free use and possession of the claim by appellees. It was an arbitrary, unjust and capricious abuse of judicial power, oppressively used against the appellants.

We submit the judgment of the lower court should be reversed and the cause remanded to the trial court with instructions to set the cause for trial on its merits at such a reasonable time that the parties may appear and have their day in court.

Respectfully submitted,

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O. D. COCHRAN,
Attorneys for Appellants.

No. 3123

3

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

BRIEF OF APPELLEES

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No. 3123

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHRIS BETSCH and JOE L. JEAN,
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vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Second Division.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This is a suit in equity to quiet the title to a placer mining claim, brought by appellees under Sec. 1307 of the Compiled Laws of Alaska (Carter's Code, Sec. 475). That section reads as follows:

"Sec. 1307. Any person in possession, by himself or his tenant, of real property, may maintain an

action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest."

It sufficiently appears from the pleadings that during the year 1916 the appellants, defendants below, claimed some kind of interest in said placer claim, for it is alleged and admitted that on April 4, 1917, said defendants below, by their agent, filed for record in the appropriate recording district an affidavit of assessment work for the year 1916 (paragraph VII of the Complaint, paragraph V of the Answer, Tr. pp. 4-6, 11). April 4th is the 94th day of the year.

So far as pertinent here, section 7 of Chapter 10 of the Session Laws of Alaska for 1915 reads as follows:

> "Section 7. In order to hold a claim or claims after the annual assessment work has been done thereon, the owner of such claim or claims, or some other person having knowledge of the facts, shall make and file an affidavit of the performance of such assessment work with the Recorder of the district in which such claim or claims is or are located, not later than ninety (90) days after the close of the calendar year in which such work was done, or the improvements made, which affidavit shall set forth the following:
>
> * * * * * *
>
> "The failure to file for record the proof of assessment work as herein provided, shall be deemed an abandonment of the location and the claim shall be subject to relocation by any other person, provided, however, that a compliance with the provisions of this section before any

> relocation, shall operate to save the rights of the original locator, and further provided, that if said placer claim or claims have not been relocated by any other person or persons within one year after such forfeiture, the last locator, claimant or owner of such forfeited claim may return to said forfeited claim or claims and relocate the same as though the same had never been located."

The complaint alleges relocation of the claim by plaintiff Umphrey on April 1, 1917, the 91st day of the year (Tr. pp. 1-2), and the recording of notice of relocation by him on April 2 (Tr. pp. 2-3), and the subsequent transfer of an interest in the claim to plaintiff Harrison (Tr. p. 3), and that plaintiffs were in possession at the time of bringing the suit, and that defendants claim some interest in the claim adverse to the plaintiffs (Tr. p. 4).

The answer of defendants admits the filing of said notice of relocation by Umphrey and that the said affidavit of assessment work was not filed until the 94th day of the year. Their affirmative answer does not controvert the title or possession of plaintiffs at the time of bringing the suit, but merely alleges that at the time of filing the answer, which was several months later—the time from May 3 to August 28 (Tr. pp. 8, 13), the defendants were "the owners in fee" and in possession of the land.

The reply denies the allegations of the "affirmative answer" (Tr. p. 13).

Although the case was set for trial no trial was had, for the plaintiffs moved for judgment on the

pleadings and the court granted the motion (Tr. pp. 17-20).

ARGUMENT

So far as setting of the trial on the forenoon of September 22, 1917, for the afternoon of the same day is concerned, no harm whatever to appellants occurred therefrom. *No trial was had.* Hence, even if it would have been an abuse of discretion to force appellants to trial on such short notice, there was no prejudicial error, for, after setting the case for trial, the Court decided to entertain a motion for judgment on the pleadings, made by appellees, and the case was disposed of on that motion, not by trial (see Judgment and Bill of Exceptions, Tr. pp. 14-15, 19).

The same considerations apply to the overruling of appellants' motion to postpone the trial. The case was set for trial in the forenoon. At the opening of the afternoon session appellants made their motion (Tr. pp. 21-22) to postpone the trial "for a period of three weeks," etc., which motion the Court denied (Tr. p. 19). But since no trial was had, the denial of the motion did not prejudice appellants in the least degree, even if it were true that they would have been prejudiced by said denial thereof if the case had gone to trial. In the mere denial of the motion there was no intrinsic harm to appellants: such harm could result only if the denial thereof were followed by a trial.

Hence the questions of setting the case for trial

and of refusing appellants' motion to postpone trial, are out of the case, for those acts of the Court, if error at all, were absolutely harmless error.

The only question in the case, therefore, as we submit, is whether the judgment on the pleadings is sustainable.

The Affirmative Answer, Though Denied by the Reply, Raises No Material Issue.

Defendants' so-called affirmative answer (Tr. p. 12) is wholly defective in that it does not purport to challenge the plaintiffs' title or possession as of the time of the commencement of the action, but only as of the time of filing the answer, namely, August 28, 1917. Viewed by itself, it therefore admits that at the time the action was begun the defendants had no title or possession, and does not deny that plaintiffs had title and possession when the action was commenced. It simply avers that the defendants "are" the owners, etc. In *Leggatt v. Stewart,* 2 Pac. (Mont.) 320, the affirmative defense was in the following words:

> "Defendants aver the facts to be that at the commencement of plaintiffs' said action, and long prior thereto, these defendants were, ever since have been, and now are, the owners of the premises described in plaintiffs' said complaint, and every part thereof, and in the possession of, and entitled to the possession of, the same."

The Court said of this defense:

> "These allegations of new matter are ambiguous and uncertain, for the reason that it is impossible to ascertain therefrom whether the

> pleader intends to aver that the defendants were in possession at the date of the commencement of the action or at the time of the filing of their answer. Hence, it follows that the instruction to the jury, that it was admitted in the pleadings that the plaintiffs were in possession of the premises at the commencement of the action, was correct."

In the case at bar there is not even an ambiguity in regard to what is intended to be alleged, for the affirmative answer clearly refers to the time of filing the answer and to no other.

To put the plaintiffs to their proof of title and possession the defendants should have set up the *nature* of their alleged claim or title. In *Wall v. Magnes,* 30 Pac. (Colo.) 56, the statute was in every essential particular like the Alaska statute. And the Court said (p. 57):

> "If defendant be not asserting an adverse claim, there is nothing to try. The language of the statute requiring plaintiff to be in possession is no more emphatic and mandatory than is that requiring the existence of an alleged conflicting interest. The statutory proceeding is in this respect unlike the action of ejectment; if defendant does not assert an adverse interest in himself, he cannot be permitted to put plaintiff upon proof of his possession and title. It is sufficient if, after pleading possession and ownership by plaintiff, the complaint aver generally that defendant claims some adverse estate or interest, and that such claim is unfounded. *Ely v. Railroad Co.,* 129 U. S. 291, 9 Sup. Ct. Rept. 293. It is for defendant, if he relies upon an adverse interest, *to plead its nature by answer.* And plaintiff is entitled to the judgment of the

> Court upon demurrer as to whether defendant's interest thus pleaded has any foundation in law. *Railroad Co. v. Oyler,* 60 Ind. 383. When defendant has shown by his answer that he asserts such an adverse interest, legal or equitable, as, if sustained by proof, *might entitle him to relief* in connection with the property, *then, and not till then,* is he in position under the statute to try the issue of plaintiff's possession and ownership."

Speaking of suits to quiet title, Pomeroy says, Remedies and Remedial Rights (2nd Ed.), §369:

> "The action has, however, been greatly extended by statute, especially in the Western States, and is there an ordinary means of trying a disputed title between two opposite claimants. The general scope of these statutes is as follows: The plaintiff must be in possession claiming an estate in the lands. The adverse claimant or claimants must be out of possession, and must assert a hostile title or interest. In this connection the possessor of the land, without waiting for any proceeding, legal or equitable, to be instituted *against* him, may take the initiative, and, by commencing an equitable action, may compel his adversaries to come into court, *assert their titles,* and have the controversy put to rest in a single judgment."

And 32 Cyc. 1360 says:

> 'It has been held that in statutory proceedings to determine adverse claims, defendant relying on an adverse claim in himself *must, as a condition precedent to the right to try the issue of plaintiff's possession, plead the nature of his claim."*

In *Lambert v. Shumway,* 85 Pac. (Colo.) 89, as in the case at bar, there were in the first part of the

answer admissions and denials of the allegations of the complaint, and the second part of the answer was, as here, an insufficient affirmative defense. The Court said:

> "The questions discussed in the briefs are as to the sufficiency of defendant's defense, and as to whether or not it was necessary for the plaintiff to prove possession in order to maintain the action. Appellant contends that plaintiff was not entitled to judgment, because the proof does not show that he was in possession of the premises, and that his being in possession is a jurisdictional matter. While plaintiff, to maintain the action, must *aver* his possession coupled with title, the duty is devolved upon defendant of asserting an adverse interest in himself and specifying its nature, *and before he can put plaintiff upon proof touching his possession and title he must plead accordingly.* * * * Defendant has not done this. The first alleged defense consists merely of denials and admissions. This defense, *standing alone, is not sufficient to put in issue the possession of plaintiff,* because, as was said in the case of *Wall v. Magnes, supra,* before defendant can put plaintiff upon proof touching his possession and title, he must plead an adverse interest in himself. The defendant may plead as many defenses to the cause of action alleged in plaintiff's complaint as he desires, but each of these defenses must be complete in itself and must be tested by its own allegations. * * * The first defense neither alleges title nor possession in the defendant.
>
> "The second defense of defendant fails, because," etc.
>
> "The second defense failing, the denial of plaintiff's possession in the first defense is not sufficient to put plaintiff upon proof touching the same."

Hence the so-called affirmative answer of defendants is defective (1) for failure to allege that defendants *had* a title when the action was begun, and (2) for failure to set out the *nature* of the title relied on. And, as the authorities just quoted hold, unless the nature of a defendant's title, as of the time when the suit was brought, is disclosed, so as to show that he has a right to compel the plaintiff to *prove* his own title and possession, the plaintiff is not compellable to put in any proof. It follows that if the defendant fails to make such disclosure and if the complaint sufficiently alleges title and possession in the plaintiff, the plaintiff is entitled to judgment on the pleadings. That was the situation in the case at bar.

The Pleadings, Construed Together, Amount to an Admission of at Least Constructive Possession in Plaintiffs, and That Is a Sufficient Basis on Which to Maintain This Action.

Even if the authorities did not require the defendant to plead specifically his own title, in order to put plaintiff to his proof—even if the denials in an answer were sufficient for that purpose—still the pleadings in this action amount, on the whole, to an admission of possession in the plaintiffs, and possession alone is a sufficient basis on which to found the action.

Though the defendants deny the allegations of possession made in the complaint, yet they admit the filing of plaintiffs' notice of location, and also admit that they, defendants, filed an affidavit of labor four days too late. They, therefore, admit

that their own title, if they had any before April 1, 1917, was forfeited on the latter date by force of the Alaska statute. The pleadings, all taken together, may thus be construed as an admission that the plaintiffs had at least constructive possession when the action was brought. And it has been held that possession alone, without a showing of title, is sufficient to support this character of action under a statute in all essentials like the Alaska statute regarding suits to determine adverse claims. Thus, in *Merced Mining Co. v. Fremont,* 7 Cal. 317, 68 Am. Dec. 262, it is said:

> "In reference to the first point, the two hundred and fifty-fourth section of the practice act provides that 'an action may be brought by any person in possession of real property against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.'
>
> "The language of this section is general and comprehensive, and allows any person 'in possession' to bring the action against any person 'who claims' an estate or 'interest' adverse to him. The only title the plaintiff is required to have is that which flows *prima facie* from possession. It has been repeatedly decided by this Court that possession was *prima facie* evidence of title * * *. This provision of the statute is founded upon evident reasons of justice and policy, and is more especially applicable to the present condition of the country."—A condition then prevailing in California which was very similar in many particulars to that now existing in Alaska.

One claiming by right of possession only can maintain the action.

Foss v. Dam, 1 Alaska 346.

In *Gavigan v. Crary,* 2 Alaska 370, 378, the Court said:

> "Plaintiffs were in possession of the real property. Crary claimed an estate therein adverse to them. They brought this 'action of an equitable nature against [Crary], who claims an estate or interest therein adverse to [them], for the purpose of determining such claim, estate, or interest.' Unless Crary is found to have a 'claim, estate or interest' in the property of a higher nature—a better title—than plaintiffs' possessory rights, plaintiffs' titles must be quieted by the decree of this Court."

And see:

Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30, 34;
Curtis v. Sutter, 15 Cal. 259;
Head v. Fordyce, 17 Cal. 149.

Citing the *Pralus* case and the *Merced Mining Company* case, Pomeroy says, 4 Eq. Juris. (3rd Ed.), §1397, note:

> "A possessory title is held sufficient to maintain the action to quiet title to a mining claim located on public lands of the United States."

It is respectfully submitted that the judgment of the lower Court should be affirmed.

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ROY V. NYE,
Attorneys for Appellees.

No. 3123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHRIS BETSCH and JOE L. JEAN,

Appellants,

vs.

FRED UMPHREY and FRED HARRISON,

Appellees.

Reply Brief for Appellants

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Reply Brief for Appellants

Argument

Appellees in their brief take the position that because the pleadings show that the Delbar affidavit was not filed until the 94th day of the year, that for that reason the trial court was justified in giving them a judgment on the pleadings.

Section 7 of Chapter 10 of the Session Laws of Alaska for 1915, after providing for the filing of the affidavit for assessment work within 90 days after the close of the calendar year, further states:

> "Provided, however, that a compliance with the provisions of this section before any relocation shall operate to save the rights of the original locator."

Under the foregoing proviso the original locator could file the proof of labor for the performance of the annual assessment work of the preceding year at any time on the 94th, 95th, 100th or 200th day of the year after such work was done before a valid relocation of the placer ground had been made. In other words the original locator still retains the ownership, title and possession to the ground until a valid relocation is made. The appellants in their answer in the court below denied that the appellees made any valid location by the discovery or marking or otherwise of the ground in controversy. This was an issue that could only have been tried by the court at a proper trial.

Section 895, Compiled Laws of Alaska, provides:

> "The answer of the defendant shall contain—
>
> First. A general or specific denial of each material allegation of the complaint controverted by the defendant, or any knowledge or information thereof sufficient to form a belief.
>
> Second. A statement of any new matter constituting a defense or counterclaim in ordinary and concise language without a repetition."

In the case at bar the answer of the defendants constituted, first, a general denial of the allegations of the complaint, and, second, an affirmative defense that the defendants were the owners in fee of the ground in controversy and in the possession and

entitled to possession of the same. No plainer, better or more concise statement could be made of the fact that the defendants were claiming the ground under a fee title and not a life estate or leasehold estate in the property, and that they were in possession of the ground, contesting possession and title to all of it with the plaintiffs.

This same question arose in an Alaskan case over a dispute for the recovery of real property and the identical question was decided by this court on appeal. See the case of *McGrath vs. Vallentine,* 167 Fed. 473, wherein the court says:

> "In an action in ejectment where the answer not only denied title of plaintiff, but as to certain of the property alleged title in defendant, it was error to render judgment for plaintiff on the pleadings."

The appellants in their answer not only denied that the appellees made any location whatever of the ground in controversy but denied that the plaintiffs were in possession at the time their suit was instituted and appellants further allege affirmatively that they are the owners in fee of the ground in controversy and in possession of the same. Such an answer is all that the Alaska Code requires. It puts the plaintiffs in the suit on notice that the defendants are claiming the ground in controversy under a fee title as against everybody except the government and certainly precludes them from recovering a judgment for the ground in contro-

versy without first having at a proper trial established the allegations of their complaint.

Respectfully submitted,

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O. D. COCHRAN,

Attorneys for Appellants.

No. 3124

5

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
Appellant,

vs.

TAM SEN,
Appellee,

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

Praecipe for Transcript of Record.

To the Clerk of the said Court:

Sir: Please make copies of the following papers to be used in preparing transcript on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Order that Writ of Habeas Corpus Issue June June 23, 1917.
5. Writ of Habeas Corpus and Marshal's Return of Service Thereof.
6. Return to Petition.
7. Order Discharging Petitioner.
8. Reporter's Transcript of Hearing June 29, 1917.
9. Petition for Appeal.

10. Assignment of Errors.
11. Order Allowing Appeal.
12. Notice of Appeal.
13. Citation on Appeal.
14. Order Extending Time for Docketing Case on Appeal 30 Days from January 25, 1918. [1*]
15. Stipulation of Attorneys and Order of the Court that Respondent's Exhibits "A" and "B," being the records of the Bureau of Immigration, and Petitioner's Exhibit "A," consisting of photographs, be transferred to the United States Circuit Court of Appeals for the Ninth Circuit, to be considered in their original form, and without being transcribed or copied.

JNO. W. PRESTON,
United States Attorney.

[Endorsed]: Service of the Within Praecipe by Copy Admitted this 16 day of Feb., 1918.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Feb. 19, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

(No. 16,211.)

In the Matter of TAM SEN (15928/1–1, ex. S. S. "Costa Rica" February 15, 1917), on Habeas Corpus.

Petition for a Writ of Habeas Corpus.

To the Honorable MAURICE T. DOOLING, United States District Judge in and for the Northern District of California, First Division:

It is respectfully shown by the petition of the undersigned that Tam Sen, hereafter in this petition referred to as "the detained," is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration for the Port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and

referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to [3] deport the said detained away from and out of the United States to the Republic of China.

That the said Commissioner claims that the said detained arrived at the Port of San Francicso on or about the 15th day of February, 1917, on the S. S. "Costa Rica," and thereupon made application to enter the United States as a native-born citizen thereof, and that the application of the said detained to enter the United States as a citizen thereof was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is admitted by the said Commissioner of Immigration that the said detained was admissible into the United States under the Acts of Congress approved February 20th, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, commonly known as the general immigration laws thereof. That it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing; that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statute in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his infor-

mation and belief alleges that the hearing and proceedings had herein and the action of the said Commissioner, and the action of the said Secretary was and is in excess of the authority committed to them by the said rules and regulations and by said statutes and that the denial of the application of the said detained to enter the United States as a native-born citizen thereof, was and is an abuse of the [4] authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

FIRST.

Your petitioner alleges upon his information and belief that the said detained has been unjustly and illegally discriminated against because, though a citizen of the United States, as aforesaid, he is of the Chinese race, and, therefore, notwithstanding his citizenship, the said Commissioner proceeded to try and determine and did deny the application of the said detained to enter the United States under the gauge and method provided in the said Chinese Exclusion and Restriction Acts, which said action was contrary to and in violation of the terms and provisions of the Act of Congress of February 20th, 1907, as amended by the Act of Congress of March 26th, 1910, which said acts are commonly known as the said general immigration laws, and that the said detained being a citizen of the United States, his citizenship could only, under the general immigration laws of the United States, be determined by a Board of Special Inquiry consisting of three immigration inspectors, formed under the terms and pro-

visions of the said immigration laws, which is a right accorded to all persons other than Chinese claiming to be citizens of the United States whose right of entrance thereto is denied or questioned by the immigration inspector upon original examination when such applicants present themselves for admission into the United States, and the said detained would then and there have an opportunity of presenting his evidence before such a Board of Special Inquiry, and in the event of the denial of his application to enter the United States as a citizen thereof, he would then and there have access to a complete copy of the record and hearings before the said board, including the decision and findings thereof, so that he might offer evidence [5] to overcome the reasons urged against the recognition of his claim of citizenship, and that he might ask for a rehearing before the said board.

SECOND.

Your petitioner further alleges upon his information and belief that the evidence presented before the immigration authorities upon the application of the said detained to enter the United States, which said evidence is now hereby referred to with the same force and effect as if set forth in full herein, was of such a conclusive kind and character establishing the birth of the detained within the United States and hence showing the said detained to be a native-born citizen thereof, and in this connection your petitioner alleges that the status of the said detained as a native-born citizen of the United States has been and was the subject of judicial inquiry and investi-

gation before this Honorable Court, and was so determined in this Honorable Court in the proceeding known, designated and entitled as follows, to wit: "In the Matter of Tam Sen, on Habeas Corpus, No. 6411"; and your petitioner further alleges that it conclusively appeared from said examination by the sworn testimony of the said detained, and the identification of his handwriting upon the original of said habeas corpus record No. 6411, and the further resemblance of the said detained to the tintype picture contained in said record, that the said detained was the person described in the said habeas corpus proceeding and to whom the said habeas corpus proceeding applied; and your petitioner alleges that this Honorable Court still has jurisdiction of said proceeding wherein the citizenship of the said detained was decreed and established, to now determine the identity of the person to whom the said Court record proceeding applied.

That your petitioner has in his possession a complete part of [6] the immigration proceeding with respect to the custody of the said detained as the same took place and transpired before the office of the Commissioner of Immigration for the Port of San Francisco, and submits the same herewith as exhibit "A," with the same force and effect as if the same were recited in full herein; that your affiant has not in his possession a copy of the proceedings had before the Secretary of Labor; that there is no copy thereof within the jurisdiction of this Court and it is impossible to obtain a copy thereof to file with this petition; and, finally, your petitioner now

refers to the records, papers and files in the said habeas corpus proceeding No. 6411 with the same force and effect as if the papers were set forth in full herein, and asks that the same may be deemed a part and parcel of this petition.

That it is the intention of the said Commissioner to deport the said detained out of the United States and away from the land of which he is a citizen by the S. S. "General Forbes," sailing from the Port of San Francisco upon the 4th day of June, 1917, at and unless this Court intervenes to prevent said deportation the said detained will be deprived of residence within the land of his birth.

That the said detained is in detention as aforesaid and for said reason is unable to verify this said petition upon his own behalf and for said reason said petition is verified by your petitioner, but for and as the act of the said detained.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding and directing him to hold the body of the said detained within the jurisdiction of this Court, and to present the body of the said detained before this Court at a time and place to be specified in said order, together with the time and cause of his [7] detention, so that the same may be inquired into to the end that the said detained may be restored to his liberty and go hence without delay.

Dated, San Francisco, Cal., June 4th, 1917.

JUNG BING GUEY.

GEO. A. McGOWAN,
Attorney for Petitioner,
Bank of Italy Bldg.,
San Francisco, California.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Jung Bing Guey, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him and he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

JUNG BING GUEY.

Subscribed and sworn to before me this 4th day of June, A. D. 1917.

[Seal] R. H. JONES,
Notary Public in and for the City and County of San Francisco, State of California.

(CHINESE PICTURE.) [8]

Due service and receipt of a copy of the within petition and order is hereby admitted this 4 day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.
CHAS. D. MAYER,
For Commissioner of Immigration.

[Endorsed]: Filed Jun. 4, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[9]**

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

In the Matter of TAM SEN (15928/1-1, ex S. S. "Costa Rica," February 15, 1917), on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the port and district of San Francisco appear before this court on the 9 day of June, 1917, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for, and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Tam Sen, are hereby ordered and directed to retain the said Tam Sen, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this Court until its further order herein.

Dated, San Francisco, California, June 4, 1917.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jun. 4, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[10]**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,210.

In the Matter of TAM SEN (15928/1-1, ex S. S. "Costa Rica" February 15, 1917), on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges,

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney. [11]

Copy rec'd June 23d, '17.

G. A. McGOWAN,
Atty. for Pet.

[Endorsed]: Filed June 23, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [12]

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 23d day of June, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable M. T. DOOLING, Judge.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

Minutes of Court—June 23, 1917—Order Overruling Demurrer to Petition for Writ of Habeas Corpus, etc.

This matter came on regularly this day for hearing on order to show cause as to the issuance of a writ of habeas corpus herein. Geo. A. McGowan, Esq,. was present as attorney for the petitioner and detained. C. A. Ornbaun, Esq., Assistant United

States Attorney for the Northern District of California, was present for and on behalf of the respondent, and presented a demurrer to petition for writ of habeas corpus. Thereupon, on motion of Mr. Ornbaun and Mr. McGowan consenting thereto, the Court ordered that the immigration records be filed and marked Respondent's Exhibits "A" and "B," and that they be considered as a part of the original petition herein. After hearing said attorneys, further ordered that said demurrer be, and the same is hereby overruled and that a writ of habeas corpus issue, as prayed, returnable June 29th, 1917, at 10 o'clock A. M. [13]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Commissioner of Immigration, Port of San Francisco, Calif., Angel Island, Calif., GREETING:

YOU ARE HEREBY COMMANDED that you have the body of the said person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged, before the Honorable MAURICE T.

DOOLING, Judge of the District Court of the United States, for the Northern District of California, at the courtroom of said court in the city and county of San Francisco, California, on the 29th day of June, A. D. 1917, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 23d day of June, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: This writ returned unexecuted this 29th day of June, 1917.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Chf. Off. Deputy.

Filed Jul. 5, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,210.

In the Matter of TAM SEN (15928 /1–1 ex S. S. "Costa Rica," February 15, 1917), on Habeas Corpus.

Return to Order to Show Cause.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the order to show cause issued by the said Court on the petition of Tam Sen for a writ of habeas corpus, and to said petition, admits, denies and alleges as follows:

DENIES that Tam Sen, the petitioner and detained, is unlawfully imprisoned, detained, confined and restrained, or unlawfully, imprisoned, or detained, or confined, or restrained of his liberty by Edward White, Commissioner of Immigration, for the Port of San Francisco, or elsewhere, or at all.

DENIES that the imprisonment, detention, confinement and restraint, or the imprisonment, or detention, or confinement or restraint of said petitioner is illegal.

DENIES that the hearings and the proceedings, or the hearings or the proceedings had herein, and the action of the said Commissioner, and the action of the said Secretary of Labor, or the action of the said Commissioner or the action of the [15] said

Secretary of Labor, was and is in excess of the authority committed to them by the said rules and regulations, or by the said rules or regulations, or by the said statutes.

DENIES further that the denial of the application of the said detained to enter the United States as a native-born citizen thereof was and is an abuse of the authority committed to them by the said statutes, or otherwise.

DENIES that the said detained has been unjustly and illegally, or unjustly, or illegally, discriminated against because of his citizenship, or otherwise.

DENIES that the action of the Commissioner in determining the application of the said detained to enter the United States under the gauge and method, or gauge, or method, provided in the said Chinese Exclusion and Restriction Acts was contrary to, and in violation of, or contrary to, or in violation of the terms and provisions of the Act of Congress of February 20th, 1907, as amended by the Act of Congress of March 26, 1910.

DENIES that the citizenship of the said detained could be determined only under the general immigration laws of the United States by a Board of Special Inquiry consisting of three immigration officers formed under the terms and provisions of the said immigration laws.

DENIES that the evidence presented before the immigration authorities was of a conclusive kind and character, or conclusive kind or character establishing the birth of said detained within the

United States, or showing that the said detained is a native-born citizen.

DENIES that the status of the said detained as a native-born citizen of the United States has been and was, or has been [16] or was the subject of judicial inquiry and investigation, or judicial inquiry, or investigation, before this Honorable Court.

DENIES that the status of the said detained was determined by this Honorable Court in a proceeding known, designated and entitled as follows, to wit: "In the matter of Tam Sen, on Habeas Corpus, No. 6411," or in any other proceedings, or at all, and in this connection respondent alleges that the proceedings referred to in said petition, and designated as "In the Matter of Tam Sen, on Habeas Corpus, No. 6411," were not proceedings in which the petitioner herein was involved, and the matter determined therein did not pertain in any way, or at all, to the status of the said petitioner.

Further DENIES that it conclusively or otherwise appeared from said examination by the sworn testimony of said detained, or otherwise, that the said detained was the person described in the *habeas corpus* proceedings referred to in said petition, and to whom the said *habeas corpus* proceedings applied.

DENIES that this Honorable Court still has jurisdiction of said proceeding wherein the citizenship of the said detained was decreed and established, to now determine the identity of the person to whom the said Court proceedings applied, other than to examine and consider the evidence in the same manner as said Court is authorized to consider questions

of fact in determining whether or not there was an abuse of discretion or an unfair hearing given to said petitioner on the part of said immigration officials or the said Secretary of Labor.

As a further, separate and distinct answer and defense to the petition on file herein, respondent alleges that since the application of the said detained to enter the United States [17] through the Port of San Francisco, certain hearings have been conducted on behalf of the said detained and testimony and other evidence taken concerning the right of the said detained to enter and remain in the United States; that said hearings were conducted and the testimony and other evidence taken by the immigration officials acting for and on behalf of the Government of the United States, and that all of said evidence and other testimony given or taken at said hearings and proceedings has been recorded by the said immigration officials in a record known as the record of the Bureau of Immigration upon the application of Tam Sen for admission into the United States, now on file herein, and marked Respondent's Exhibit "A," and also other exhibits on file herein marked Respondent's Exhibit "B"; that the said testimony and other evidence and all of the records and exhibits that were considered and referred to herein are incorporated into this return, and made a part hereof.

WHEREFORE, respondent prays that said petition for a writ of habeas corpus be denied and the order to show cause be discharged; that the said alien be remanded to the custody of the respondent

for deportation, as provided for in the said warrant of deportation heretofore issued by the said Secretary of Labor of the United States, and for such other and further relief as to this Court seems just and equitable.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney. [18]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to petition for writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to the petition for writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHAS. D. MAYER.

Subscribed and sworn to before me this 28 day of November, 1917.

C. W. CALBREATH, (Seal)
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Jun. 29, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [19]

In the District Court of the United States for the Northern District of California, First Division.

Before Hon. MAURICE T. DOOLING, Judge.

No. 16,211.

In the Matter of TOM SEN, on Habeas Corpus.

Testimony Taken in Open Court.

Friday, June 29, 1917.

COUNSEL APPEARING:

For the Government:

CASPER A. ORNBAUN, Esq., Asst. U. S. Attorney.

CHARLES D. MAYER, Esq., Court Officer, Immigration Service.

For the Petitioner: GEORGE McGOWAN, Esq.

Testimony of Tom Sen, in His Own Behalf.

TOM SEN, called in his own behalf, sworn.

Mr. ORNBAUN.—In order to preserve any rights that the Government desire to preserve, I wish to raise an objection at this time to opening the case.

Mr. McGOWAN.—Q. What is your name?

A. Tom Sen.

Q. Where were you born?

A. In San Francisco, 712 Dupont Street, upstairs, fourth floor.

Q. About what year; what is the Chinese year?

A. Seventh year of Tung Gee; 1868, I think.

Q. When did you go to China the first time?

A. *Then* years, when I am 10 years. [20]

Q. When you were 10 years of age?

A. When I was 10 years.

Q. When did you come back?

A. Twenty-one.

Q. When you were twenty-one years of age?

A. Yes; back on the "Oceanic" steamer.

Q. Do you recall how you were landed, whether you were landed in a court proceeding, or not?

A. What do you mean?

Q. How were you permitted to come back into the United States?

A. I came in the United States the first time, I came back by the steamer "Oceanic."

Q. How were you permitted to come into the United States, was your case tried in court?

A. Yes, tried in court.

(Testimony of Tom Sen.)

Mr. McGOWAN.—For the purpose of identification only at this time, I desire to offer in evidence the records and proceedings in the *habeas corpus* matter No. 6411; the records and files of this court in the matter of Tom Sen upon *habeas corpus,* in which it is shown that the detained in that proceeding, Tom Sen, arrived at this port on the steamship "Oceanic" in June, 1888, and in the proceedings there is a tintype photograph upon which is endorsed a signature, and also appended to which are attached certain signatures.

Mr. ORNBAUN.—The Government desires to object to that.

Mr. McGOWAN.—Q. On these *habeas corpus* proceedings, were you released on bond?

A. Yes, bond for $1500, for my coming out of the ship.

Q. You were released on $1500 bond to come out of the ship? A. Yes.

Q. Was a picture taken of you? A. Yes.

Q. I show you this tintype in the *habeas corpus* proceeding, No. 6411, and ask you if you know who that picture is? A. That is my picture.

Q. I call your attention to the signature, and ask you if you [21] know who that is?

A. That is mine.

Q. Did you write that, at that time?

A. Yes, sir.

Q. Did you write it yourself? A. Yes, sir.

Q. Who were the people who signed your bond?

(Testimony of Tom Sen.)

A. One name is Mr. Tom Pock; one, Tom Ching Sue.

Q. I will show you this signature attached to the bond in the *habeas corpus* proceeding No. 6411, and I will ask you whose is the first signature upon that bond? A. That is my signature.

Q. Did you write that yourself?

A. Yes, I wrote that myself.

Q. The second Chinese signature?

A. Tom Pock.

Q. He was one of your bondsmen?

A. Yes, sir.

Q. This other name that is down there is—

A. Ching Sue.

Q. Do you know what Ching Sue's business was?

A. He has a pawnshop on Clay, corner of Clay Street and Dupont Street, upstairs, pawnshop.

Mr. McGOWAN.—For the purpose of identification I desire to offer in evidence the preliminary statement taken from the passenger Tom Ah Sen, holder of ticket 589, ex. S. S. "Oceanic," which arrived at this port June 3, 1888, and which has endorsed upon it "D. C." meaning the District Court, No. 6411, which is a statement taken from that passenger upon his arrival, by the Collector of Customs at that time.

Q. I show you the signature attached to this statement, and ask you if you know whose signature that is? A. That is me.

Q. Did you write that yourself? A. Yes, sir.

Q. At that time? A. Yes, sir.

(Testimony of Tom Sen.)

Mr. McGOWAN.—At this time, if your Honor please, we desire to introduce in evidence, by consent, the record of the Immigration Expert upon the handwriting submitted in this case, which is as follows: It is addressed to the Commissioner of Immigration. [22] "In re #15928/1–1, Tom Sen, Native C. B., ex. S. S. "Costa Rica," Feb. 15, 1917.

In accordance with instruction of the acting inspector in charge, Chinese Division, I to-day compared the signature of Tom Sen on landing record June 17, 1888, No. 9237, S. S. "Oceanic" with that written by him to-day both by brush and pencil, and I am of the opinion that all signatures are those of the same person." It is dated March 30, 1917; and signed Young Kay.

The COURT.—Who is Young Kay?

Mr. McGOWAN.—A Chinese interpreter. He is one of the official Chinese interpreters attached to the immigration service.

Q. Now, at the time you came here in '88, did you have any marks on your *fact*? A. No marks.

Q. Any scars, or pitmarks?

A. I had these, yes (indicating).

Q. A pitmark on each side, right on the bridge of your nose?

A. Yes; I got this and this (pointing to his head).

Q. In looking at the tintype picture which you have identified as being yourself, do you find those two scars on those two pictures?

A. They must be *these.*

Q. They must be there? A. Yes, sir.

(Testimony of Tom Sen.)

Q. When you were a young man did you have any trouble with your eyes? A. Yes, sir.

Q. What is known as cross-eyes?

A. Yes, I had when I was a small boy; the last seven years ago, I got my eyes sick, and now they are better.

Q. I mean before that?

A. Before I get sore eye?

Q. When you returned here in '88, Quong Sue 14th, at that time did you have anything the matter with your eyes?

A. I think so, yes; I got when a small boy. **[23]**

Cross-examination.

Mr. ORNBAUN.—Q. What was the matter with your eyes when you were a small boy, and first came to this country? A. They got hurt before.

Q. Have you ever had an operation on your eyes?

A. Before, yes, I got a doctor.

Q. Did the doctor ever cut a muscle in your eye, with a knife? A. Yes, sir, before.

Q. When did he cut your eye?

A. I think 15 years or 16 years.

Q. What did he cut your eye with?

A. I don't know; I got hurt and the doctor cut it.

Q. What doctor?

A. A Chinese doctor; Doctor Ging.

Q. Where is his office? A. In China.

Q. What kind of instrument did he use when he worked on your eyes; did he use medicine, a liquid,—water? A. He put medicine on it.

Q. Did he use anything else?

(Testimony of Tom Sen.)

A. I don't know what kind of medicine.

Q. Did he use a knife on your eye? A. Yes.

Q. Did he use a sharp knife of some kind?

A. Some kind,—I don't know; he cured it for me.

Mr. McGOWAN.—He was examined by the immigration authorities about it. It seems that when he went to China from Mexico City,—he was running a restaurant in Mexico City—he had some eye trouble on the way to China, and he was treated by the Chinese doctor on the Mowry line of steamer, running from Mexico to China. I don't think he ever had what is known as an operation to correct defective vision.

Mr. ORNBAUN.—You are willing to concede that he never had anything in the nature of an operation for cross-eyes? [24]

Mr. McGOWAN.—Mr. Jones, the interpreter is here, ask him through the interpreter.

(Examination through the Chinese interpreter.)

Mr. ORNBAUN.—Q. Did you ever have cross-eyes? A. Yes, when I was a small boy.

Q. How did you cure it? A. It was cut.

Q. What with?

A. An instrument about so long, measuring about four inches.

Q. Clear up the fact as to whether there was an operation on his eyes with a knife?

A. Yes, sir, with a knife.

Q. How old were you when the operation was performed? A. About fourteen or fifteen.

(Testimony of Tom Sen.)

Q. How long was that after you left the United States for China?

A. About four years or so after; I went back in 1887; about the 7th or 8th of Quong Sue, I had it cut.

The INTERPRETER.—That would be 1881 or 1882.

Mr. ORNBAUN.—Q. In 1881 or 1882 you had your eye cut for cross-eyes? A. Yes, sir.

Q. And since that time your eyes have remained just about as they are now? A. Yes, sir.

Q. You have never had any operation on your eyes since 1881 or 1882?

A. I had still another doctor again.

Q. When was that?

A. Seven years ago; but he did not tell me what was done then.

Q. What kind of an operation was performed on your eyes seven years ago?

A. It was all red, and I applied for a remedy.

Q. Was it a liquid remedy? A. It was liquid.

Q. Did you ever have any other operation by a knife, since that first operation?

A. I had them just cut once, only.

Q. That was in 1881 or 1882. I want to be sure and clear up that date.

The INTERPRETER.—Yes, when he had the operation of cutting. [25]

Mr. ORNBAUN.—Q. When you were examined at Angel Island on March 30, 1917, do you remember the following questions being asked you, and these answers given:

(Testimony of Tom Sen.)

"Q. When you were a boy, were your eyes ever crossed?

"A. Yes, a little when I was young."

The WITNESS.—That is what I said.

Mr. ORNBAUN.—"Q. How was that defect cured, and at what time? A. Afterwards, I never took any treatment and it was gone. I didn't notice how it was cured."

Mr. McGOWAN.—He said his eyes were crossed at one time; and sometime after that he got over it.

The WITNESS.—That is what I answered.

Mr. ORNBAUN.—Q. What did you mean by that answer?

A. He applied some remedy, liquid remedy. I don't understand, don't know, just what he did.

Mr. McGOWAN.—It is not the contention of the defendant that there has ever been an operation, that is a surgical operation, to correct defective vision. He has a scar on his eye; that may be what he refers to as to a knife being used with respect to his eye. He also testified as to his eyes being treated for something. I don't know that his eyes have been operated upon to correct defective vision.

Mr. ORNBAUN.—I understood him to say that he was affected with cross-eyes when he was young, and that the doctor treated him with a knife.

Q. I understood you a while ago to say that you had an operation when you were a boy with a knife to correct cross-eyes? A. Yes.

Q. I understand from the testimony here that you never took any treatment, but it was gone. What

(Testimony of Tom Sen.)
explanation have you to offer for that?

A. I was referring to that; that there was a time when [26] I was very near-sighted, and afterwards, when I was about 22 years of age, that defect was gone.

The INTERPRETER.—In other words, it is not the cross-eye matter he is speaking of here, he is speaking of near-sightedness, instead of the cross-eye matter.

Mr. ORNBAUN.—Q. When you were a boy were your eyes ever crossed?

A. Afterwards I never took any treatment and it was gone.

Q. Is that the time he had the operation with the knife?

A. The way that was, I was sick; I was sick after I was near-sighted.

Mr. ORNBAUN.—I think it may be conceded by counsel that he never has had an operation for cross-eyes since 1881 or 1882.

Mr. McGOWAN.—You see what the man says himself. This man has lived in Mexico City upwards of 20 years; and no one here knows him, or can we expect them to know him. I went over with him to Angel Island, and I asked through the agent and he himself stated that his eyes had been crossed. The immigration authorities instead of bringing out that his eyes had been crossed, they brought out the fact of his eyes being treated on the ship to China; then they again brought out about his vision being defective, and being crossed.

(Testimony of Tom Sen.)

Mr. ORNBAUN.—The only point I desire to clear up is whether his eyes had been the same with reference to being crossed since 1888, at the time the statement was taken here. I want to show that they have remained the same ever since that period, without any operation by way of a knife, or by way of an operation with a knife.

The INTERPRETER.—The word "gun" means "near"; the word "gun" of another tone, means "muscle." The two words are words which are very hard to distinguish. [27]

Mr. ORNBAUN.—That has nothing to do with the time. I understand that in 1881 or 1882 he had an operation for cross-eyes; that since 1881 or 1882 there has been no operation for cross-eyes; if his eyes have been treated, it is only by some liquid treatment.

Mr. McGOWAN.—Mr. Boyce discovered some defect in this man's eyes; he discovered it, and noted it.

Testimony of Charles D. Mayer, for Defendant.

CHARLES D. MAYER, called for defendant, sworn.

Mr. McGOWAN.—Q. You are an immigration inspector connected with the office of the local Commissioner of Immigration? A. I am.

Q. In your official capacity you made a comparison of this applicant with the original photograph attached to the court record in this case,—a comparison of the applicant with a photographic copy of the original court record—the original court photograph was still in here?

(Testimony of Charles D. Mayer.)

A. We did not have that before.

Q. I will ask you if this is the opinion which you expressed at that time:

> "While from a comparison of the applicant personally with the original photograph attached to the court record and the enlargement of the same I note one or two rather vague minor differences, on the whole I am more inclined to think that the tintype represents the applicant than that it does not. In this comparison I am considering the great lapse of time and lack of distinctness in the tintype, which to my mind makes a detailed examination of the features of uncertain value."

A. I expressed that opinion.

Q. Mr. Mayer, will you kindly look at the features of this Tom Sen and tell me whether you note or observe two pit mark scars on the [28] inner corner of each eyebrow, at the base of the forehead, right in the frontal bone?

A. I observe scars in the place you mention; but I don't know whether they are pit mark scars, or not.

Q. Will you look at this tintype photograph with this glass, and tell me whether or not you observe two similar scars on the inner corner of the eyebrows of the subject of the tintype?

A. I would like to examine it in the light.

Mr. McGOWAN.—Certainly.

Q. After your examination of this photographic tintype for the express purpose of noting the two scars indicated, I will ask you if you find two such

(Testimony of Charles D. Mayer.)

scars on the inner corner of the eyebrows of the subject of the tintype?

A. I find two places on the tintype which I take to be scars, which correspond with the location of the scars on the defendant.

Mr. McGOWAN.—That is all.

Cross-examination.

Mr. ORNBAUN.—Q. Are you still of the opinion, Mr. Mayer, that the Chinaman here this morning is the same person whose picture that represents?

A. I have not examined him for that purpose yet; his mustache has been shaven off since I examined it before.

Mr. McGOWAN.—That was done at the suggestion of the Court, so there would be a better opportunity of observation of his features.

Mr. ORNBAUN.—Can you examine him and give us that opinion?

A. (After examination.) I am still of the same opinion. I wish to say to the Court that in my former opinion I did not state that I was convinced this was the same man.

Q. Do you think, Mr. Mayer, that this is the same man who received his discharge in this court?

A. If I were called upon to decide whether or not he was, I would— [29]

Mr. McGOWAN.—That is for the Court to say.

The COURT.—Well, I would like to hear his opinion anyway.

Mr. MAYER.—While I am not absolutely satisfied that he is the same man, I would consider him so—

(Testimony of L. Lorenzen.)

as being the same man, rather than not being the same man.

Mr. ORNBAUN.—If your Honor please, under these circumstances, I do not think that the Government would be justified in going any further into this case. I take the position that where such a valuable right of any person is at stake, and there is such a strong resemblance as in this case, I don't believe that, under the circumstances, the Government is really justified in pressing the case any further.

The COURT.—I don't want to put the burden of this upon you, Mr. Ornbaun, I am willing to assume it myself.

Testimony of L. Lorenzen, for the Government.

L. LORENZEN, called for the United States, sworn.

Mr. ORNBAUN.—Q. Mr. Lorenzen, what is your official capacity?

A. I am an immigration inspector, of the United States immigration service.

Q. You had occasion to examine the matter before the Court concerning the identity of the Chinaman who has just taken the stand?

A. I was asked to give an opinion, or, rather, to make a comparison of the defendant and the photograph attached to the court record in question.

Q. I will ask you to examine these photographs and state whether or not you can identify this photograph, or some photographs of the man that you were

(Testimony of L. Lorenzen.)

trying to identify at the time you passed upon the question, which is now in the record before the court?

A. These are, or at least appear to be the same photographs which were submitted to me for comparison, but in addition thereto I also had the benefit of having the applicant in person before me, and it was in reality a comparison between the photograph attached **[30]** to the court record and applicant, and on which I based my opinion.

Q. This identical picture you had before you?

A. Yes, sir; I also had this enlarged copy.

Q. Which is also attached here? A. Yes, sir.

The COURT.—May I see these photographs?

Mr. ORNBAUN.—Certainly, your Honor.

Mr. ORNBAUN.—Q. You compared those photographs with the complainant, Tom Sen, did you?

A. Yes, I did.

Q. What conclusion did you come to after that comparison?

A. I believe that would be most correctly expressed by reading my opinion as set forth in the record at that time, which I cannot not repeat.

Q. I want to call your attention to page 26 of the record and I will ask you if that is the opinion you expressed at that, at that time?

A. Yes; that is the opinion that I expressed at that time.

Q. You identify that as the opinion?

A. I do, yes.

Q. (Reading:) "In comparing applicant in person with the enlarged photograph of that attached to the

(Testimony of L. Lorenzen.)

court record, I note a decided difference in the rims of applicant's right ear and the left ear in the aforesaid photograph, which ears should be corresponding in view of the fact that the photograph on the court record is a tintype. In getting the exact position of applicant showing the same amount of applicant's left ear as is shown in the right ear of the aforesaid photograph, a very large tragus is shown on applicant, same covering the larger part of the cavity of the ear, while no tragus is shown in the corresponding ear on the photograph of the court record leaving the large round cavity exposed to view. Applicant's eyes are regular in shape and quite expressive, whereas those on the enlarged photograph of the person referred to in the court record are decidedly crossed and almond shaped. **[31]** The bridge of the applicant's nose is quite prominent for a Chinese whereas, that on the aforesaid photograph appears less prominent and broader. Applicant's nose runs to a rather sharp point for a Chinese, while the point of that in the aforesaid photograph seems more elevated or turned up. Applicant's eyebrows are quite high at the nose and a straight line can almost be drawn through them all the way across, while the right eyebrow in the photograph seems to be decidedly curved downward toward the nose. In view of the dissimilarities set forth I do not believe applicant has established his identify with the person referred to in said court record." That was your statement? A. Yes, sir.

Q. Do you desire to make any further comparison

(Testimony of L. Lorenzen.)

between the picture and the applicant who is before the court this morning?

A. I would like to say this, that I did not notice the scars that have been referred to here in court; I would like, if it is agreeable to the Court, to see if I see such scars, which might affect my impression.

The COURT.—Yes.

The WITNESS.—(After examination.) I would state that I find what I believe are scars or pitmarks on the photographs in almost the identical position as the scars, or rather, pitmarks on applicant's face; and this naturally would be a point in favor of applicant's contention.

Cross-examination.

Mr. McGOWAN.—Q. One *one* the main points which led you to the adverse conclusion for the immigration service was with reference to the tragus of the ear? A. Yes, sir.

Q. By that you mean this portion of the ear extending in front of and covering the cavity?

A. Yes, sir.

Q. You know, do you not, in taking a tintype photograph that where **[32]** a part of the features are turned in the shade, it appears perfectly black, does it not?

A. I don't believe I could qualify as an expert in photography, and for that reason I don't think I can answer that.

Q. I would suggest that you take the tintype photograph there and examine that for the tragus of

(Testimony of L. Lorenzen.)
the ear under the magnifying-glass, and I think you will find the rim of it discernible in the shade; in other words, I believe that defect is caused by the light shading, and not by the absence of that piece of cartilage?

A. I cannot say that I see the rim of what might be the tragus. By a reference to the outline of what would be the tragus, I am unable to see any such outline.

Q. You would not be prepared to say that this detained before the Court is not the subject of this picture?

A. I would not want to swear he is not.

Q. Your opinion is not so firmly fixed but what you would not be prepared to admit that this detained is not the subject of this picture?

A. I would certainly—I would not swear that he is not, but my examination of the photographs justify doubt in the matter.

Q. With your opinion? A. Yes, sir.

Q. The location of these two scars in the same place—

A. (Intg.) They lessen that doubt very materially to my mind.

Q. In favor of this detained? A. Yes, sir.

Testimony of Adolph Juel, for the Government.

ADOLPH JUEL, called for the Government, sworn.

Mr. ORNBAUN.—Q. What is your name?

A. Adolph Juel.

Q. Where do you live? A. 1230 Clayton Street.

(Testimony of Adolph Juel.)

Q. What is your business? A. Police officer.

Q. Have you any connection with the identification bureau of the [33] Police Department?

A. I am in charge of the Bureau.

Q. Did you at any time previous to this have occasion to identify or attempt to compare the picture that has been presented here this morning with that of the applicant?

A. That photograph was submitted to me last March by Inspector Robinson.

Q. I call your attention to these photographs?

A. Yes; they were submitted last March by Inspector Robinson.

Q. Have you made an effort to identify these photographs with a photograph of the applicant before the Court this morning? A. Yes.

Q. You had those two photographs?

A. Yes, sir.

Q. I will ask you whether or not you had the applicant before you at the time you made the examination?

A. No, sir; not the applicant, simply the photographs.

Q. In your opinion you expressed the opinion that it was not the same photograph; that is, the photograph which appears in the record was not the photograph of the applicant?

A. That these two are not the same man.

Q. Are you still of that opinion?

A. I am still of that opinion.

Q. I wish you would state your reasons for that.

(Testimony of Adolph Juel.)

A. Taking the photograph of this young Chinese boy the lobes are enlarged, and apparently the man has lobes, where this man here has no lobes; in other words, the ear is attached to the head; there is no lobe.

Q. Is there any other point?

A. That is the only thing I base my opinion on.

Q. Have you ever had occasion to compare photographs, and then later compare the picture with the living being, to know whether or not you could always rely on the picture?

A. When we compare figures and have the individual there and the photograph we generally take a profile photograph to get the tragus of the ear; however, in this case there is no difference **[34]** here—there is no chance for a mistake at all.

Q. You usually take a profile of the ear because you compare it with the subject? A. Yes.

Q. I will ask you to make a brief comparison of the picture with the applicant? A. Yes.

Q. I will ask you to take particular note of the scars just over the eyes and over the nose, and compare those scars with the little marks that appear on the photograph?

A. He has got the scars on the forehead; relative to the scars on the plate, that might be a flaw in the plate.

Q. I will ask you to compare his ears, the ears of the photograph with the ears of the individual here?

A. The ears of this man are attached to the face, the lobes. There are no lobes at all; whereas this

(Testimony of Adolph Juel.)

photograph shows distinctly that the man has lobes, as you can judge.

Q. Wouldn't it be possible for the side of the face to be shaded to such an extent that you would not be able to tell?

A. That is difficult for me to answer; I know nothing about photography.

Cross-examination.

Mr. McGOWAN.—Q. Your opinion is merely based—

A. (Intg.) On the formation of the ear.

Q. What you believe to be the formation of the ear from what is shown on the photograph?

A. That is the idea.

Q. You are not prepared to say from the photograph, shown here, whether it is connected to the head or not? A. No.

Q. I will call your attention to the fact that in the tintype photograph that portion of the man's face is turned in the shade so you cannot see whether the head is connected with the neck one side, and on the other side the dark obscures it. [35]

Mr. ORNBAUN.—Q. Just point out on that picture to the Court if you will in comparing the picture with the individual, what you consider the material point?

A. Take this man's ear; you find it is attached to the face. This one here is on the side. Of course it is a difficult matter, unless you have a decided profile photograph.

(Testimony of Charles W. Pierce.)

The COURT.—Do I understand you to say these two ears correspond?

Mr. McGOWAN.—Yes; this tintype represents the position of the face.

The WITNESS.—I would not *say* to say that this is the man,—no, sir. This man has got a *loble* according to my idea.

Testimony of Charles W. Pierce, for the Government.

CHARLES W. PIERCE, called for the Government, sworn.

Mr. ORNBAUN.—Q. Mr. Pierce, you were also one of the inspectors at the Immigration Station at the time that the hearing was given this applicant, Tam Sen? A. Yes, sir.

Q. You had occasion to identify photographs that are before the Court this morning with the individual, and also with the picture that was taken of him at the time of his court record?

A. I compared the applicant in person with those enlarged copies.

Q. And also with the photograph that was taken of him at the time that the Court passed upon the applicant and permitted him to land in the United States? A. Yes, sir.

Q. At that time you expressed the opinion that he was not the same individual? A. I did.

Q. Will you state your reasons for that opinion?

A. I think— [36]

Q. (Reading:) "After a careful comparison of the applicant in person with the enlarged photograph

(Testimony of Charles W. Pierce.)

of that appearing on the court record in this case, I am of the opinion that he is not the person there represented. The eyes of the applicant are of a regular type and shape while those of the person shown in the court record are crossed and strictly almond shaped. The applicant has blended ear lobes while the person represented by the photograph on the court record has not. The ear cavities of applicant appear quite regular while the enlarged photograph of the one appearing upon the court record shows the left ear cavity to be of a rounding shape. The nose appears different and the lower lip of the person in the court record is considerably thicker than that of applicant.'' Is that your opinion? A. Yes, sir.

Q. Did you have occasion to compare the individual with the picture? A. I did.

Q. Did you observe any scars upon the individual or upon the pictures at that time?

A. I do not recall any.

Q. Would you care to make an examination between the individual and the pictures concerning the scars and state whether or not that would have any influence upon your opinion? A. Yes.

Q. You have made a comparison just now of the picture and the individual? A. Yes, sir.

Q. Did you observe any scars just over the eyes of the individual? A. Yes.

Q. Do you observe any print of any scars on the photograph?

A. I observe what appear to be two very faint scars, in very nearly the same position. [37]

(Testimony of Charles W. Pierce.)

Q. Would you take the two scars that appear on the picture as the same two scars that appear upon the individual? A. Not necessarily.

Q. What explanation have you to offer?

A. It is very common to find Chinese pitted, particularly between the eyebrows. I think in possibly one in every three, or one out of every four, you will find pitted between the eyebrows; that has been my experience.

Q. I will ask you if you don't take it to be rather a strange coincident that there should be two pits just over the eyes of the individual which appear in the photograph when all of the other features are so similar?

A. I don't think the other features are similar; my opinion is that the features are dissimilar. The mere fact that the pits were there would not overcome the other features.

Q. You are still of the opinion that they are a different individual? A. Yes, sir.

Q. That is, that the applicant is not the same individual that was discharged in the court record in 1888? A. Yes, sir.

Cross-examination.

Mr. McGOWAN.—Q. Did I understand you to say that every one *Chinamen* out of every three has two pitmarks between his eyes in your belief?

A. That is a rough estimate; I would say one in every four.

Q. One out of every four are pit marked?

(Testimony of Charles W. Pierce.)

A. Between their eyebrows; that and the corners of the mouth.

Q. Don't you think there would be material changes in the formation of a person's face after a lapse of 30 years between the taking of such pictures? A. Mostly assuredly there would.

Q. Do you know anything at all about photography or taking [38] tintype photographs?

A. I don't know as I know just what you mean.

Q. The way features are shown up through the medium of the tintype. A. I have some knowledge.

Q. During what period of the time have you had knowledge concerning the reproduction of the features by means of a picture, to make a study of it?

A. I have never made a study of it; no sir.

The COURT.—I would like to ask where the petitioner has been since his arrival in this country?

Mr. McGOWAN.—He has been at the Immigration Station all the time.

In this matter I have an opinion as to the identity of this man; and while it is not usual, I want to offer my testimony.

Mr. McGOWAN.—I suggest that it be understood that the whole of this record as read be offered in evidence. You have no objection, Mr. McGowan, to the whole record being considered as part of the case?

Mr. McGOWAN.—I have no objection at all.

Mr. ORNBAUN.—I desire to offer it.

Testimony of George McGowan, for Applicant.

GEORGE McGOWAN, called for Applicant, sworn.

Mr. McGOWAN.—My name is George McGowan. I am attorney for the detained in this matter. I submit an opinion as to the identify of this detained as being the person represented in the photographic pictures which have been presented. After a perusal of the opinions which have been filed by Mr. Lorenzen, Mr. Mayer and Mr. Pierce, and from an inspection of the tintype [39] picture and a comparison with the applicant himself, I am firmly of the opinion that the applicant is the person represented in this tintype picture. That opinion is based upon the general similarity of all the physical features, the nose, the big lobes, the eyebrows, the shape of the chin, and particularly the shape of the ear; the inner lobe as shown in the two pictures together, the formation in the upper rim of the two ears is identical in appearance. Upon the further fact from the inspection of the tintype picture, under the magnifying glass, and comparing that with the applicant, I find that on the inner corner of the eyebrows *they* are two scars shown on the tintype, and from a comparison of the applicant he appears to have in person two old scars in exactly the same position or place. Upon the further fact, which is based upon an experience of 20 years in comparing Chinese persons, with tintypes, I have found in examining these tintypes that any projection of the features which stands in the shaded light will cause a shade which

(Testimony of George McGowan.)

appears almost blank. Now, on examination of this photograph under the glass, you will find the prominent check-bones, as more clearly shown in the person of this detained, caused a shade on each place on the features as shown in the tintype photograph. I find the lips and the general shape of the face is the same, making allowance for the change after a lapse of thirty years.

With reference to the point made by Mr. Juel that the lobes of the ear do not appear to be attached to the side of the face as they appear in the detained in life, a comparison of the tintype picture, while it shows on the open side, shows the lobe or cheek intervenes between the lobe and the place where it would be joined to the cheek, so it is impossible to tell on that ear [40] whether it is joined or detached. On the other side the lobe is prominent, but the shade is shown back of that. The ear stands in relief before the shade of the Chinaman's queue which was behind his head. I find it is impossible to determine whether the lobe, or a piece of it, is disjoined or attached. I am positively of the opinion that it is the same man.

The COURT.—Were these records and signature, which were identified by the petition, submitted to the detained?

Mr. McGOWAN.—They were not.

Mr. McGOWAN.—We desire to formally offer in evidence on behalf of the detained the entire record and proceedings in Court Record No. 6411, formerly

offered for identification, and the enlarged photographs.

(The documents are marked Petitioner's Exhibit "C.") [41]

Opinion.

The COURT. (Orally:) I am still of the opinion that it is not only the province, but the duty, of the Court of a matter which is properly brought before it, to determine the validity of its own judgments, and to determine to what individuals and to what property they apply. That being so, I am thoroughly satisfied that the judgment rendered in 1888 was a judgment in favor of this particular individual, and the *petition* will be discharged from custody.

The legal question as to whether it is the province of the Court so to determine the matter is one of exceedingly great importance, and probably ought to be set at rest. I am not saying that the Court will undertake to determine the applicability of the judgments of other courts, but where a judgment is entered in the court itself, it must not only be within the power of the Court, but it must be the duty of the Court to determine to what individuals and to what property which a judgment is applicable; otherwise, it would be valueless, if some outside person could say it does not apply to this man or to this property. For that reason I am of the opinion that there the matter is properly brought before the Court, that it is not only the province *or* the Court, but its duty, to determine to whom the judgment applies. And I am inclined to believe, without hav-

ing made any investigation of the matter, that if, say a Chinese person having one of these certificates, claiming to have been discharged by a Court here, or a court in Vermont, desired to go back to China, and fearing that upon his return his identify would be denied, I think upon notice to the Government in the form of a bill *quia timet,*—that is, that he fears upon his return that he would not be admitted, —that he could have his identify established before leaving here. I think [42] that must be true. Otherwise these judgments are not of much value. I am not impugning the integrity of the Immigration Department; if they have the power to do it, it may be done in any case. It is a question of power. I understand that the validity of the judgment is not assailed, but it is said that while the judgment is valid, it does not apply to this individual.

The petitioner will be discharged.

Mr. ORNBAUN.—The Government desires to save an exception.

The COURT.—Yes.

[Endorsed]: Filed Feb. 6, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [43]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

(Order of Discharge.)

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ORDERED, that the said named person in whose behalf the writ of habeas corpus was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 29th day of June, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed June 29, 1917. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,211.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

TAM SEN,

Appellee.

Notice of Appeal.

To the Clerk of the Above-entitled Court, to Tam sen, and to George McGowan, Esq., His Attorney.

You and each of you will please take notice that Edward White, Commissioner of Immigration at the Port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment made and entered herein on the 29th day of June, 1917, setting aside the return to the petition for a writ of habeas corpus, and discharging the said Tam Sen from the custody of the said Edward White, Commissioner of Immigration at the Port of San Francisco, and appellant herein.

Dated this 27th day of December, 1917.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant. [45]

[Endorsed]: Service of the within notice of appeal by copy admitted this 27 day of Dec., 1917.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Dec. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [46]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,211.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

TAM SEN,

Appellee.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California:

Edward White, as Commissioner of Immigration at the Port of San Francisco, appellant herein, feeling aggrieved by the order and judgment made and entered in the above-entitled cause on the 29th day of June, A. D. 1917, discharging Tam Sen from the custody of said appellant, does hereby appeal from said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the

reasons set forth in the assignment of errors filed herewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents, and all of the papers upon which said order and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court, and in accordance with the law in such case made and provided. [47]

Dated, this 27th day of December, A. D. 1917.

JNO. W. PRESTON,
United States Attorney,
C. A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant.

[Endorsed]: Service of the within Petition for Appeal by copy admitted this 27 day of December, 1917.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Dec. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [48]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,211.

EDWARD WHITE, as Commissioner of Immigration, at the Port of San Francisco,

Appellant,

vs.

TAM SEN,

Appellee.

Assignment of Errors.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit, taken herein by his attorneys, John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made by this Honorable Court on the 29th day of June, A. D. 1917.

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Tam Sen, from the custody of Edward White, Commissioner of Immigration at the Port of San Francisco.

II.

That the said Court erred in holding that it had jurisdiction [49] to issue the writ of habeas corpus in the above-entitled cause, as prayed for in the petition of the said Tam Sen for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Tam Sen was insufficient in character.

V.

That the Court erred in holding that the said Tam Sen was illegally restrained of his liberty by the said Edward White, Commissioner of Immigration, and that the evidence taken at the hearing of said case, under the Immigration Act of February 20, 1907, as amended by the acts of March 26, 1910, and March 4, 1913, and the Chinese Exclusion Laws, was insufficient to justify the said respondent, Edward White, to detain or deport the said Tam Sen.

VI.

That the Court erred in permitting the appellee to go beyond the record as presented upon the hearing of the petition for a writ of habeas corpus and introduce new and other evidence in conjunction to that submitted on behalf of appellee in the hearings held

before the said appellant and the said Secretary of Labor.

VII.

That the Court erred in opening said case and permitting [50] appellee to introduce evidence for the purpose of showing that the said appellee was the same person whose status was determined by the above-entitled Court in a proceeding entitled "In the Matter of Tam Sen on Habeas Corpus, No. 6411," at a time prior to the hearing of said petition for a writ of habeas corpus in the above-entitled court.

VIII.

That the Court erred in permitting said appellee to introduce evidence for the purpose of contradicting the record and findings of the Secretary of Labor, all of which record and findings were presented by the said appellee and were before the Court and duly considered upon the hearing of said petition of said appellee for a writ of habeas corpus.

IX.

That the Court erred in discharging the said appellee, Tam Sen, from the custody of the said Edward White, Commissioner of Immigration, and appellee herein.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court, for the Northern District of California, made and entered herein, in the office of the clerk of said court, on the said 29th day of June, 1917, setting aside the return to the Petition for a writ of habeas corpus, and discharging the said Tam Sen from the custody of Edward White, Commissioner of Immi-

gration, be reversed, and that the said Tam Sen be remanded to the custody of said Commissioner of Immigration.

Dated, this 27th day of December, 1917.

JNO. W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellant. **[51]**

[Endorsed]: Service of the within assignment of errors by copy admitted this 27 day of Dec., 1917.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Dec. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[52]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,211.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

TAM SEN,
Appellee.

Order Allowing Appeal.

On motion of John W. Preston, United States Attorney, and Casper A. Ornhaun, Assistant United

States Attorney, attorneys for appellant in the above-entitled cause.

IT IS HEREBY ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

Dated, this 27th day of December, 1917.

WM. H. HUNT,
Judge of the District Court.

[Endorsed]: Service of the within order allowing appeal, by copy admitted this 27 day of Dec., 1917.

GEO. A. McGOWAN,
Attorney for Petitioner.

Filed Dec. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

Stipulation (as to Original Exhibits).

It is hereby stipulated and agreed by and between

the prespective parties in the above-entitled cause that the records of the Immigration Service, which were filed in the above-entitled court as Respondent's Exhibits "A" and "B," and which were made a part of respondent's return to the petition for a writ of habeas corpus in said cause, together with certain photographs filed in the above-entitled court as Petitioner's Exhibit "A," may be transferred, in their original form and without being transcribed or copied, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said records of the immigration service are and may there be considered as a part of respondent's return to the said petition for a writ of habeas corpus, and the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of the said respective parties.

JNO. W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.
GEO. A. McGOWAN,
Attorney for Petitioner. **[54]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,211.

In the Matter of TAM SEN, on Habeas Corpus.

Order Transmitting Original Exhibits to Appellate Court.

It appearing to the Court that it is both necessary and proper that the records of the Immigration Service and photographs referred to in the above stipulation should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, in determining the appeal of the said cause, the same having been filed and considered as stated in this court;

IT IS THEREFORE ORDERED that the said records and photographs be transferred in their original form by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the same are to be returned to the clerk of the above-entitled court.

WM. C. VAN FLEET,
U. S. District Judge.

[Endorsed]: Filed Feb. 19, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. **[55]**

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 55 pages, numbered from 1 to 55, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the Matter of Tam Sen, on Habeas Corpus, No. 16,211, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with "Praecipe" (copy of which is embodied in this transcript), and the instructions of the attorney for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of twenty dollars and fifty cents ($20.50).

Annexed hereto is the original citation on appeal, issued herein (page 57).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of February, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. **[56]**

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Tam Sen and to His Attorney Geo. A. McGowan, Esq., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein Edward White, as Commissioner of Immigration at the Port of San Francisco, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. HUNT, United States Circuit Judge for the Ninth Circuit, this 27th day of December, A. D. 1917.

WM. H. HUNT,
United States Circuit Judge. **[57]**

[Endorsed]: No. 16,211. United States District Court for the Northern District of California. Edward White, Appellant, vs. Tam Sen. Citation on Appeal. Filed Dec. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within Citation on Appeal by copy admitted this 27th day of Dec., 1917.

GEORGE A. McGOWAN,
Attorney for Petitioner.

[Endorsed]: No. 3124. United States Circuit Court of Appeals for the Ninth Circuit. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Tam Sen, Appellee. Transcript of the Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed February 21, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,210.

In the Matter of TAM SEN (15928/1–1, ex S. S. "Costa Rica," February 15, 1917), on Habeas Corpus.

Stipulation and Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of Casper A. Ornbaun, attorney for the respondent herein,

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, may and the same is hereby extended thirty (30) days from and after the date hereof.

Dated San Francisco, Cal., January 25, 1918.

M. T. DOOLING,
United States District Judge.

The making of the foregoing order is hereby stipulated and agreed to by and between counsel for the respective parties hereto.

GEO. A. McGOWAN,
Attorney for Petitioner.
JNO. W. PRESTON,
U. S. Attorney for Northern Dist. of California,
Attorney for Respondent.

[Endorsed]: No. 16,210. In the Southern Division of the District Court of the United States for the Northern District of California, First Division. In the Matter of Tam Sen, etc., on Habeas Corpus. Stipulation and Order Extending Time to Docket Case.

No. 3124. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to February 25, 1918, to File Record Thereof and to Docket Case. Filed Jan. 25, 1918. F. D. Monckton, Clerk. Refiled Feb. 21, 1918. F. D. Monckton, Clerk.

No. 3124.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellant,

vs.

TAM SEN,

Appellee.

BRIEF FOR APPELLANT.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellant.

Filed this.....day of May, 1918.

FRANK B. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 3124.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellant,

vs.

TAM SEN,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Southern Division of the United States District Court for the Northern District of California, First Division, discharging on a writ of habeas corpus the said appellee, Tam Sen.

The said Tam Sen is a person of the Chinese race who arrived at the Port of San Francisco on the S. S. "Costa Rica," February 15, 1917, and applied for admission to the United States at said Port as a native born citizen thereof. He presented as a right to enter the United States as a citizen thereof a certified copy of court discharge Number 6411

issued to one Tam Sen out of the District Court of the United States for the Northern District of California, dated December 17, 1888, claiming to be the rightful holder thereof and the identical person referred to therein.

Applicant was given a hearing by the proper Immigration officers and was denied admission to the United States by the aforesaid Commissioner of Immigration on the grounds that he was *not the person discharged* by order of said United States District Court, December 17, 1888 and was therefore not entitled to admission. The appeal was taken from said decision to the Secretary of Labor at Washington, D. C., who affirmed said excluding decision. Thereafter, to wit, on the 4th day of June, 1917, a petition for writ of habeas corpus was filed in the aforesaid District Court, wherein it is alleged that the action of the said Commissioner and the action of the said Secretary of Labor was and is in excess of the authority committed to them under the laws, rules and regulations and was and is an abuse of the authority committed to them by said laws, rules and regulations.

1st. That the said Tam Sen, being a citizen of the United States was entitled to have his status as such determined under the general Immigration laws by a Board of Special Inquiry instead of by the gauge and method provided for in the Chinese exclusion and restriction acts.

2nd. That the said Tam Sen is the same person referred to in a proceeding, entitled "In the Matter of Tam Sen on Habeas Corpus, Number 6411," decided in the aforesaid Court and that the said Court has jurisdiction of said proceeding wherein the citizenship of said Tam Sen was decreed and established, to now determine the identity of the person to whom the said court record proceeding applied.

A demurrer to the petition for writ of habeas corpus was filed by the Government on June 23, 1917, together with respondent's exhibits "A" and "B"; hearing was had and the demurrer overruled and an order made that writ issue returnable June 29, 1917. A return was filed by the Government on June 29, 1917, and the case was re-opened for the taking of testimony. At the conclusion of the hearing it was ordered that the writ of habeas corpus issue, notice of appeal filed December 27, 1917.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Tam Sen, from the custody of Edward White, Commissioner of Immigration at the Port of San Francisco.

II.

That the said Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the

above entitled cause, as prayed for in the petition of the said Tam Sen for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Tam Sen was insufficient in character.

V.

That the Court erred in holding that the said Tam Sen was illegally restrained of his liberty by the said Edward White, Commissioner of Immigration, and that the evidence taken at the hearing of said case, under the Immigration Act of February 20, 1907, as amended by the acts of March 26, 1910 and March 4, 1913, and the Chinese Exclusion Laws, was insufficient to justify the said respondent, Edward White, to detain or deport the said Tam Sen.

VI.

That the Court erred in permitting the appellee to go beyond the record as presented upon the hearing

of the petition for a writ of habeas corpus and introduce new and other evidence in conjunction to that submitted on behalf of appellee in the hearings held before the said appellant and the said Secretary of Labor.

VII.

That the Court erred in opening said case and permitting appellee to introduce evidence for the purpose of showing that the said appellee was the same person whose status was determined by the above entitled Court in a proceeding entitled "In the Matter of Tam Sen on Habeas Corpus, No. 6411," at a time prior to the hearing of said petition for a writ of habeas corpus in the above entitled court.

VIII.

That the Court erred in permitting said appellee to introduce evidence for the purpose of contradicting the record and findings of the Secretary of Labor, all of which record and findings were presented by said appellee and were before the Court and duly considered upon the hearing of said petition of said appellee for a writ of habeas corpus.

IX.

That the Court erred in discharging the said appellee, Tam Sen, from the custody of the said Edward White, Commissioner of Immigration, and appellee herein.

ARGUMENT.

The principal points involved in this case are:

FIRST: Whether or not Tam Sen is the person referred to in a proceeding known as "In the Matter of Tam Sen on Habeas Corpus, No. 6411."

SECOND: Whether or not the Court below had jurisdiction in habeas corpus proceedings to determine the identity of the person to whom the said court proceedings apply.

Whether or not Tam Sen is the person referred to in said Court proceedings is purely a question of fact to be determined by the proper Immigration officers after due hearing and examination of all the evidence produced, and being a question of fact, is a question over which the Court below had no jurisdiction and therefore the Court erred in hearing the case de novo for the purpose of determining such fact.

It is a well established principle that where Congress, by constitutional enactments has entrusted to executive officers as a special tribunal determination of all questions of fact, including a claim of citizenship, relating to the right of entry into the United States of Chinese applying therefor, the decision of such executive officers is final, where no abuse of authority is shown. This point was decided in the case of *Ekiu vs. United States,* 142 U. S. 660, wherein the Court says:

> "And Congress may, if it sees fit, as in the statutes in question in United States vs. Jung Ah Lung just cited, authorize the Courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of these facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or contravert the sufficiency of the evidence on which he acted."

In the case of *United States vs. Ju Toy,* 198 U. S. 253, the Court says:

> "It is established as we have said that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts."

The Rules and Regulations governing the admission of Chinese provide that they shall be examined, first under the General Immigration Laws and if found admissible thereunder, they shall then be examined under the Chinese Exclusion Acts. This procedure was followed in the case of Tam Sen, who was found admissible under the General Immigration Laws, there appearing to be no statutory grounds thereunder for his denial. He was then examined

under the Chinese Exclusion Acts and it having been determined, after a fair and impartial hearing of the facts in the case by the Commissioner of Immigration for the Port of San Francisco and by the Secretary of Labor at Washington, D. C., that the said Tam Sen *was not the person referred to* in the proceeding known as "In the Matter of Tam Sen on Habeas Corpus, No. 6411," he was refused admission into the United States and his deportation ordered. The finding of the Secretary of Labor on the question of identity was purely a question of fact and under the numerous court decisions was final and conclusive. The District Court, however, assumed jurisdiction apparently upon the theory that the writ of habeas corpus issued in 1888, on which the photograph was submitted for identity, was an old record in said court, and for that reason it had jurdisdiction to make the comparison. On taking additional evidence, the District Court reached a conclusion directly opposed to that determined by the administrative officers, upon whom Congress has seen fit to confer exclusive jurisdiction. That this was error, the appellant respectfully cites to this Honorable Court the case of *ex parte Long Lock,* 173 Fed. 208, in which Judge Ray decided, after a most careful review of the Supreme Court decisions above quoted, that the District Court could not reverse the Secretary of Labor on a question of fact, where that official had determined that a Court record giv-

ing a Chinese person American citizenship was not sufficiently identified with him and had ordered his exclusion from the United States.

The Secretary does not in any way attack the validity of this Court record of 1888; he does not in any way question that decision, nor that the picture attached is the photograph of some Chinese person bearing the name of Tam Sen and who appeared before the Court and was discharged, but where the decision of the Secretary has intervened in determining the question of identity, it is an unwarranted assumption of power for the District Court to rule that that executive officer was wrong.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellant.

No. 3124

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellant,

vs.

TAM SEN,

Appellee.

REPLY BRIEF FOR APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

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GEORGE A. McGOWAN,
Attorney for Appellee.
Bank of Italy Building,
550 Montgomery Street,
San Francisco, Cal.

Filed this.....day of June, 1918.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE FREEMAN PRINT SHOP

No. 3124

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,

Appellant,

vs.

TAM SEN,

Appellee.

REPLY BRIEF FOR APPELLEE

Statement of the Case.

A question arises at the threshold of this case as to whether or not the order allowing the appeal, which is the basis of this proceeding, is sufficient to enable the Court to examine into the points which would otherwise be involved in the case. The order follows:

"Order Allowing Appeal.

"On motion of John W. Preston, United States Attorney, and Casper A. Ornbaum, Assistant United States Attorney, attorneys for appellant in the above-entitled cause.

"IT IS HEREBY ORDERED, that an appeal to the

> United States Circuit Court of Appeals for the Ninth Circuit, from an order and judgment heretofore made and entered herein, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.
>
> "Dated, this 27th day of December, 1917.
>
> "WM. H. HUNT
>
> *"Judge of the District Court."*

It will be observed that this order allowing the appeal does not designate from what order or what judgment the appeal is. It is not identified as having been made on a certain date, nor is it identified by what the purport of the order may have been. An examination of the record, pages 12 and 13, discloses that on that date the lower court made an order, the important part of which is as follows [page 13], to wit:

> "After hearing said attorneys, further ordered that said demurrer be, and the same is hereby overruled and that a writ of habeas corpus issue, as prayed, returnable June 29th, 1917, at 10 o'clock a. m."

Whereas, upon page 49 of the record is disclosed an order made upon the 29th day of June, holding

> "that the detained was illegally restrained of his liberty as alleged in the petition, and that he be and he is hereby discharged from custody from which he has been produced and that he go hence without day."

It is shown that the order allowing an appeal in this case does not refer to either the notice of appeal or peti-

tion for appeal or the assignment of errors. It stands alone without designating which of the two orders or judgments the appeal was to be allowed from.

Tam Sen is a native-born citizen of the United States of America. His status as such was the subject of judicial determination before the United States District Court for the Northern District of California in the habeas corpus proceeding entitled in his name and numbered 6411. This adjudication was made December 17, 1888. Tam Sen arrived at the port of San Francisco on the steamship "Costa Rica" February 15th, 1917, and sought to re-enter the United States as a native-born citizen thereof. He did not base his right of entry upon any supposed exemption or privilege contained in the Chinese Exclusion Laws. All citizens of the United States other than Tam Sen, who arrived on the steamship "Costa Rica" were landed after an inspection under the General Immigration Law. Tam Sen was examined under the Immigration Law and found admissible, and then instead of being landed, was passed along and examined under the Chinese Exclusion Laws [Page 7, Appellant's brief]. It is contended that this was illegal procedure. The Constitution of the United States which guarantees equal protection of the law would not sanction a procedure which permits all citizens of American birth, other than Chinese, to have their citizenship determined under the more friendly General Immigration Act and say to the American citizen of Chinese birth that you alone may not have your citizenship determined under the more friendly General Immigration Law, but must

have your citizenship determined under the more rigorous procedure of the Chinese exclusion and restriction acts.

At the hearing before the Commissioner of Immigration under the Chinese Exclusion and Restriction Acts it is contended there was no real question involved as to the identity of Tam Sen with the person described in the court record No. 6411. Identity was conclusively established by identity with name; by identity of handwriting, comparing the three exemplars of Tam Sen's hand writing made in 1888, two of which are contained in the court record 6411 and one in Chinese Bureau record which preceded the court proceeding, with exemplars of his hand writing made when he was an applicant for admission in 1917; together with a knowledge upon Tam Sen's part of all of the corroborating facts contained in the habeas corpus proceedings 6411; together with a facial likeness to the tin type photograph in the habeas corpus record 6411, which, notwithstanding the passage of twenty-nine years, was so similar as to cause some of the immigration officers to express the opinion that it was Tam Sen, and even caused the Assistant District Attorney now prosecuting this appeal, to make the following statement upon the hearing of this case before the lower court, after Mr. Mayer, the law officer connected in the office of the Commissioner of Immigration, who is the respondent in this case, had testified as follows, on pages 32 and 33 of the record:

> "Q. Do you think, Mr. Mayer, that this is the same man who received his discharge in this court?

"A. If I were called upon to decide whether or not he was, I would—

"MR. MCGOWAN: That is for the Court to say.

"THE COURT: Well, I would like to hear his opinion anyway.

"MR. MAYER: While I am not absolutely satisfied that he is the same man, I would consider him so—as being the same man rather than not being the same man.

"MR. ORNBAUM: If your Honor please, under these circumstances I do not think that the Government would be justified in going any further into this case. I take the position that where such a valuable right of any person is at stake, and there is such a strong resemblance as in this case, I don't believe that, under the circumstances, the Government is really justified in pressing the case any further.

THE COURT: I don't want to put the burden of this upon you, Mr. Ornbaum, I am willing to assume it myself."

Upon Tam Sen's case being brought into the lower Court upon the present habeas corpus proceedings it was contended the lower Court still had jurisdiction to determine to whom its record applied. The hearing before the Court amply demonstrated one essential reason for this fact. It was shown that from the original record of the Court, that is, the original tin type photograph of Tam Sen, that there were physical marks and scars discernible upon the original tin type which were not observable upon the photographic copies thereof. An examination of the original tin type under a microscope, and a comparison of the petitioner, Tam Sen, with the original tin type, showed that Tam Sen had the scars or marks of identification so discernible on the tin type when examined under the

microscope. This is further shown from an extract of the testimony of Inspector L. Lorenzen, Record 35-36:

> "Q. Do you desire to make any further comparison between the picture and the applicant who is before the Court this morning?
>
> "A. I would like to say this, that I did not notice the scars that have been referred to here in court; I would like, if it is agreeable to the Court, to see if I see such scars, which might affect my impression.
>
> "THE COURT: Yes.
>
> "THE WITNESS [after examination]: I would state that I find what I believe are scars or pitmarks on the photographs in almost the identical position as the scars, or rather pitmarks on applicant's face; and this naturally would be a point in favor of applicant's contention."

The only circumstance against Tam Sen before the Immigration Service is the fact that certain officers of their service in comparing Tam Sen with the photographic copy of the tin type picture, found certain points which they contended were shown by the photographic reproduction of the tin type and were not shown in a personal comparison with Tam Sen. The vice of these comparisons is that they are at best but the opinions of the persons who uttered them, and the opinions are based upon photographic copy of a tin type picture with the original thereof after the lapse of 29 years. In the tin type picture the subject's head is tilted back so that his long nose appears short. His face was covered with lights and shadows to such an extent that many of his true features were obscured, and his face was held at such an angle that it could not be told whether the lobe of his ear was connected

at the end thereof with his cheek or not. The main point against Tam Sen in their comparisons was the question of the ear in the tin type picture, as it was there made to appear. The point is best illustrated by directing attention to the testimony of identification expert of the Police Department of San Francisco, Adolph Jewell, qouting from the record, pages 39 and 40:

> "Q. I will ask you to compare his ears, the ears of the photograph, with the ears of the individual here?
>
> "A. The ears of this man are attached to the face, the lobes. There are no lobes at all; whereas this photograph shows distinctly, that the man has lobes as you can judge.
>
> "Q. Wouldn't it be possible for the side of the face to be shaded to such an extent that you would not be able to tell?
>
> "A. That is difficult for me to answer; I know nothing about photography."

CROSS EXAMINATION

> "MR. MCGOWAN: Q. Your opinion is merely based—
>
> "A. On the formation of the ear.
>
> "Q. What you believe to be the formation of the ear from what is shown on the photograph?
>
> "A. That is the idea.
>
> "Q. You are not prepared to say from the photograph, shown here, whether it is connected to the head or not? A. No."

Quoting also from the testimony of Inspector Lorenzen on page 37:

> "Q. You would not be prepared to say that this detained before the Court is not the subject of this picture?

"A. I would not want to swear he is not."

And again from the testimony of Inspector Pierce, on page 44 of the record:

> "Q. Don't you think there would be material changes in the formation of a person's face after a lapse of 30 years between the taking of such pictures?
>
> "A. Most assuredly there would.
>
> "Q. Do you know anything at all about photography or taking tintype photographs?
>
> "A. I don't know as I know just what you mean.
>
> "Q. The way features are shown up through the medium of the tintype?
>
> "A. I have some knowledge.
>
> "Q. During what period of the time have you had knowledge concerning the reproduction of the features by means of a picture, to make a study of it?
>
> "A. I have never made a study of it, no sir."

As a matter of positively identifying this respondent, the former applicant for admission, with the Tam Sen of the habeas corpus proceedings in 1888, I have heretofore mentioned the three old exemplars of his handwriting. Upon this point attention is directed to page 24 of the record, which is as follows:

> "MR. MCGOWAN: At this time, if your Honor please, we desire to introduce in evidence, by consent, the record of the Immigration expert upon the handwriting submitted in this case, which is as follows: It is addressed to the Commissioner of Immigration
>
> " 'In re: No. 15928/1-1 Tom Sen, Native, C. B. ex ss "Costa Rica"; Feb. 15, 1917.
>
> " 'In accordance with instructions of the acting inspector in charge, Chinese Division, I today compared the signature of Tom Sen on landing record

June 17, 1888, No. 9237, S. S. "Oceanic" with that written by him today both by brush and pencil, and I am of the opinion that all signatures are those of the same person.' It is dated March 30, 1917; and signed Young Kay."

Tam Sen is thoroughly Americanized in appearance, dress, manner, custom, and also speaks our language quite thoroughly. An examination of the record before the Immigration Service will show that Tam Sen was examined through the medium of an interpreter, but this was the exaction of the Immigration Bureau, and had nothing to do with Tam Sen's ability to speak English. The testimony given before Judge Dooling was in the main given without the aid of an interpreter. In fact, an interpreter was only called when technical matters were inquired into. At the conclusion of the hearing Judge Dooling held in part as follows [Record, page 47]:

"OPINION.

"THE COURT [orally]: I am still of the opinion that it is not only the province, but the duty of the Court of a matter which is properly brought before it, to determine the validity of its own judgments, and to determine to what individuals and to what property they apply. That being so, I am thoroughly satisfied that the judgment rendered in favor of this particular individual, and the petition[er] will be discharged from custody.

"The legal question as to whether it is the province of the Court so to determine the matter is one of exceedingly great importance, and probably ought to be set at rest. I am not saying that the Court will undertake to determine the applica-

bility of the judgments of other courts, but where a judgment is entered in the court itself, it must not only be within the power of the Court, but it must be the duty of the Court to determine to what individuals and to what property which a judgment is applicable; otherwise, it would be valueless, if some outside person could say it does not apply to this man or to this property. For that reason I am of the opinion that [where] there the matter is properly brought before the Court, that it is not only the province or [of] the Court, but its duty, to determine to whom the judgment applies. . . . . "

SPECIAL NOTE

In comparing photographs from life with a tin type or photograph thereof, it must be borne in mind that the tin type is the reverse of a photograph taken from life, hence in comparing the photograph of Tam Sen taken from life with the original tin type picture or the photographs thereof, the left hand side of the photograph corresponds to the right hand side of the tin type or photograph thereof, and *vice versa*. In the folder in evidence where the enlargement of the photograph from life and the enlargement of the tin type are placed together, the sides which are in the center of the folder correspond and the two sides on the outer edges of the folder correspond.

ARGUMENT

There are four points involved in this case.

First—Whether the order allowing the appeal is sufficient, it not specifying the order from which the appeal was allowed.

Second—Whether a citizen of this country, of Chi-

nese extraction, returning from abroad, is not entitled, as a matter of right, to have his citizenship determined in the same way and under the same law by which all other citizens of this country have their citizenship determined.

Third—Whether or not there was an abuse of discretion upon the part of the Immigration officials in disregarding the evidence of citizenship presented by Tam Sen.

Fourth—Whether or not the Court below has jurisdiction in habeas corpus proceedings to determine the identity of the person to whom its own former court proceedings applied.

First—It is maintained that the order allowing the appeal in this case is insufficient to properly present before this Court the points which would otherwise be involved in the record. The point of this is that the order which allows **an appeal** does not designate the order or judgment from which the appeal is allowed. An examination of the record will show that in addition to the original order to show cause [T. R. 10] there was an order overruling the demurrer [T. R. 11 and 12] and the order of discharge [T. R. 49.]

Backus vs. *Yep Kim Yuen*, 227 Fed. 848.

Second—It is maintained that all citizens of this country without distinction, returning from abroad, are entitled to have their citizenship determined in exactly the same way. Rule 3 of the Regulations governing the admission of Chinese persons to the United States

provides that Chinese shall be examined first, as to the right of admission under the laws regulating immigration. *Ex parte Wong Tuey Hing,* 213 Fed. 112 [Page 114]. General Immigration Act of 1907, 34 Stat. 898, in sections 24 and 25 thereof, it is provided in part as follows:

> "Sec. 24. . . . . Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence. . . . . The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry.
>
> "Sec. 25. That such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards. . . . . "

In the present case instead of appointing a Board of Special Inquiry, the Commissioner of Immigration

proceeded to determine the citizenship of Tam Sen under the method and gauge provided by the Chinese Exclusion Laws, which provide for an entirely different procedure. Under the General Immigration Law, the Commissioner of Immigration is purely an executive officer, the *quasi* judicial function of determining the cases being vested in the immigration inspectors, first singly and then grouped in a Board of Special Inquiry. Under the Chinese Exclusion Laws the individual inspector examines and reports upon the case much as a referee would, and the Commissioner of Immigration then exercises the *quasi* judicial function of determining the case. In each instance a right of appeal exists from an adverse conclusion to the Secretary of the Department of Labor. The immigration procedure allows a complete inspection of the entire record, including the findings and reasonings of the Board of Special Inquiry. The procedure under the Chinese Exclusion Laws withholds this matter from the applicant for admission, only advising him of the final result. It is maintained that there cannot be two separate ways of determining American citizenship with due regard to the equal rights of all citizens before the law. In *U. S.* vs. *Sing Tuck,* 194 U. S. 161, it is held that:

> "Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country, and alleging that he is a citizen, it is within the power of Congress to provide, at least, for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed

to enter the country without further trial."

The Sing Tuck decision is the forerunner of the Jew Toy case [198 U. S. 253] which in turn was followed by the Chin Yow case [208 U. S. 8]. In all of these cases it is noteworthy to observe that the point here urged is not discussed. In the Sing Tuck case, however, it is rather assumed that citizenship is determined by immigration inspectors.

The prejudicial effect of proceeding to determine this case under the Chinese Exclusion Laws springs from the fact that the Examining Inspector, who had this case from the beginning, was the one who completed the hearing and made his adverse recommendation, thus virtually disposing of the case, whereas, had the hearing been accorded under the General Immigration Laws this original examining inspector would have been incapacitated from acting on the Board of Special Inquiry, and the hearing would have been had before three immigration inspectors whose minds were not already made up against the applicant. *United States* vs. *Redfern*, 180 Fed. 500:

> "It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal, and a board of special inquiry constituted as in this case is at least open to suspicion. I do not believe that the law contemplates that the inspector who makes the preliminary examination shall serve on the board of special inquiry, and I must hold in this case that the board which denied the petitioner the right to land was illegal and without power."

Third—It is maintained that there was an abuse of

discretion in disregarding the evidence of citizenship presented by Tam Sen. In *Low Wah Suey* vs. *Backus,* 225 U. S. 460, it is held that:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

The Government in its brief relies upon the case of *ex parte Long Lock,* 173 Fed. 208, the opinion of which is written by Ray, District Judge. For the purpose of showing that the author of this opinion has agreed with us upon the law as it is applicable to a case such as is here presented, we cite an earlier case, the opinion of which was written by Ray, District Judge. In the case of *ex parte Kee Low,* 161 Fed. 592, District Judge Ray set forth the principles which would justify the Court in intervening, although in the Lee Kow case the facts did not so warrant. The extract follows:

> "The decision made was neither arbitrary nor unwarranted, and the evidence was not so conclusive as to warrant a court in saying that there has been an abuse of power or discretion. Unless the Court must say this or is forced to this conclusion by the record, it is its duty to dismiss the writ."

In the case of *ex parte Long Lock,* Judge Ray enunciates the principles of law involved in the concluding

portion of his decision, on page 215, as follows:

> "As decided in *Chin Yow* vs. *United States,* 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369, this court can only examine the evidence to see (1) was a full and fair and unbiased hearing had? and (2) was the decision based on such a state of facts that a question of fact was presented for the decision of the inspector? or (3) was the evidence conclusive, as matter of law, so that the decision, affirmed by the Department of Commerce and Labor, was arbitrary and unwarranted? I think the decision and order was fully warranted."

The case of *ex parte Long Lock, supra,* is chiefly valuable in the present case as it illustrates the facts of a case of a Chinese person applying to re-enter the United States, claiming that his status as an American citizen had been pre-determined before the Courts of the United States. The court held that the evidence presented was not so conclusive upon the point claimed as to warrant it to hold as a matter of law, that the decision of the executive authorities was arbitrary and unwarranted.

Upon behalf of the appellee in this case, our main reliance as a case illustrative of the facts of a person of Chinese descent applying to re-enter the United States, whose status as a citizen thereof had been judicially determined, is the case of *United States* vs. *Chin Len,* 187 Fed. 544, decided by the Circuit Court of Appeals for the Second Circuit. It is held on page 548, as follows:

> "This ruling denying the relator admission was not based on any convincing proof, but on conclusions drawn from slight and, in our opinion,

> wholly inconsequential discrepancies in the papers and mistakes in the testimony of the relator. In view of all the facts and circumstances shown by the record, we have no doubt that the relator is the identical person who was adjudged to be entitled to enter and to remain in the United States by United States Commissioner Paddock's judgment, and that he is the person who went to China in 1907 and returned to this country in 1909. To find otherwise would be arbitrarily to disregard the overwhelming weight of testimony."

It is recommended to the Court that it peruse the decision of the lower Court in the Chin Len case, which is reported as part of the decision of the Circuit Court of Appeals, though immediately preceding it. It covers pages 545-548. It is respectfully submitted upon this point that there was no real question of identity presented. That upon the facts as shown it was an arbitrary action to decide that the applicant for admission was other than Tam Sen who had been previously discharged in the habeas corpus proceeding mentioned.

It is a presumption of law that identity of person is indicated from identity of name. The strength of this presumption is augmented when both surnames and given names are identical. This is further augmented when the names are not of common occurrence, and where there are other methods of corroboration which further identify the person, such as the production of a document from proper custody, and similarity of handwriting.

Sperry vs. *Tebbs,* 10 Ohio Dec. 318;
16 Cyc. 1055;
Sewell vs. *Evans,* 4 Q. B. 626;

Bennett vs. *Libhart*, 27 Mich. 429;
Simpson vs. *Dismore*, Dowl. P. C. N. S. 357; 5 Jur. 1012; 9 M. & W. 314;
Myer vs. *Indiana Nat. Bk.* 27 Ind. App. 354, 61 N. E. 596;

In 2 Corpus Jur. 1102, it is held that, citing *U. S.* vs. *Hom Lim*, 214 Fed. 456, *Jew Sing* vs. *United States*, 97 Fed. 582:

> "The production of the statutory certificate establishes *prima facie* the right to remain, and the burden then shifts to the Government which must produce some proof to overcome this *prima facie* evidence or it will be the commissioner's duty to discharge defendant. The proof should be clear and convincing, and until the government has made out such a case the holder of the certificate is not required to make further proof."

This Court has already had before it the value of pit or pock marks on the face as the method of exclusively establishing the identity of the person involved. In *Chin Ah Yoke* vs. *White*, 244 Fed. 940, at pages 941 and 942, this Court held:

> "Not only is there a general resemblance between the photographs, with such difference as might be produced by three years of fast living, but the peculiar significance of the photographs is in the fact that in each there are two pit or pock marks, plainly visible, found in the identical position on each face."

Fourth—It is maintained that the lower Court has always jurisdiction to determine to what persons or to what things its own records apply. The final judgment rendered in the habeas corpus case of Tam Sen, No. 6411 in the records and files in the lower Court,

expressly find that he is a citizen of the United States, and that he

> "is illegally restrained of his liberty as alleged in the petition herein, that he be and he is hereby discharged from the custody from which he has been produced, and that he go hence without day."

Jurisdiction to determine the issues involved in the case having properly been before the Court, and the Government having had its day in Court, and it having been then and there determined that Tam Sen was a citizen of the United States, certainly there must be some potency to that portion of the judgment which states **"that he go hence without day."** The Court that determined his citizenship is in a better position, by reason of the record before it, to determine to whom that record belongs, than any other tribunal. The original tin type photograph is a pertinent part of the record of the lower Court, and may not be removed therefrom. The important part that this played as a means of identification was shown upon the hearing of the judgment of the lower Court wherein all of the experts and the attorneys, and, indeed, also the Court, observed under the microscope the scars upon the original tin type photograph, and noted the scars in the same place upon the face of the petitioner then before the Court, and this after the elapse of twenty-nine years, which had passed between the taking of the tin type picture and the examination in court. This, probably, in the judgment of the Court, conclusively established the identity of the detained, as being the person of whom the original tin type picture had been taken.

The record discloses that the original record 6411 was introduced in evidence in this case before the lower Court in the trial of this issue [P. 46 and 47] and the same was marked "Petitioner's Exhibit C." It is incumbent upon the appellant to produce a complete record before the Court, yet as attention was directed upon the hearing herein that this "Exhibit C" had been omitted by appellant, it is assumed that appellant will take the proper steps to present the same before this Court.

In finally submitting this case for the consideration of the Court, I feel impelled in doing so to cite the language of the Assistant District Attorney, Mr. Ornbaum as contained on page 33 of the record as follows:

> "MR. ORNBAUM: If your Honor please, under these circumstances, I do not think that the Government would be justified in going any further into this case. I take the position where such a valuable right of any person is at stake, and there is such a strong resemblance as in this case, I don't believe that, under the circumstances, the Government is really justified in pressing the case any further."

Respectfully submitted,

GEORGE A. MCGOWAN,

Attorney for Appellee.

No. 3126

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. MURRAY, *Appellant,*

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

*No.*_____

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES A. MURRAY, *Appellant*,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

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PLAINTIFF'S CASE IN CHIEF

DEFENDANT'S CASE IN CHIEF

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JAMES E. MURRAY, ESQ.,
Butte, Montana,
Solicitor for Appellant.

J. M. STEVENS, ESQ.,
Pocatello, Idaho,
Solicitor for Appellee.

In the District Court of the United States for the District of Idaho, Eastern Division.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt, *Plaintiff*,

vs.

JAMES A. MURRAY, *Defendant.*

No. 205

PETITION.

To the Honorable, the Judge of the District Court of the United States, for the District of Idaho, Eastern Division:

Comes now your petitioner, H. E. Ray, as Trustee of the Estate of Alec Murray, Bankrupt, and files this, his petition, against the above named defendant, James A. Murray, whose citizenship and residence are hereinafter particularly described, and thereupon complains and says:

I.

That your petitioner, H. E. Ray, is a citizen of the State of Idaho, and a resident of the City of Pocatello, County of Bannock and State of Idaho, and that the property hereinafter described is situate in said County and State.

II.

That the defendant, James A. Murray, is a citizen of the State of Montana, and a resident of the City of Butte, County of Silver Bow, and State of Montana.

III.

That this suit is of a civil nature in equity and is between citizens of different states, and arises under the laws of the United States, and the amount in controversy herein exceeds the sum or value of Three Thousand Dollars, exclusive of interest and costs.

IV.

That one Alec Murray was duly adjudicated a bankrupt in an involuntary bankruptcy proceeding entitled "In the Matter of Alec Murray, Bankrupt," in the District Court of the United States, for the District of Idaho, Eastern Division, on the 15th day of July, 1917; that the schedule of assets and liabilities filed in said proceedings by said Alec Murray, Bankrupt, are as follows, to-wit: (Exhibit 'A' hereto attached and made a part hereof, with the same effect as though set forth in haec verba.)

V.

That your petitioner, H. E. Ray, was duly elected trustee by the creditors of said Alec Murray, Bankrupt, in a certain bankruptcy proceeding on the 31st day of July, 1917, entitled: "In the Matter of Alec Murray, Bankrupt," in the District Court of the United States for the District of Idaho, Eastern Division.

VI.

That your petitioner, H. E. Ray, thereafter duly qualified as such Trustee and is now the duly elected, appointed, qualified and acting Trustee of said Alec Murray, Bankrupt.

VII.

That on or about the 5th day of March, 1917, and within four months next preceding the date of filing of the petition of the creditors for the adjudication of said Alec Murray to be a bankrupt, the said Alec Murray purported to transfer and deliver by deed certain real estate and improvements thereon situate in the County of Bannock, State of Idaho, and of the value of Forty Thousand Dollars, to the said James A. Murray, defendant herein, for the consideration of One Dollar; that said real estate is more particularly described as follows, to-wit:

> "Commencing at the Northwest corner of Lot one of Block three hundred seventy-two, of the City of Pocatello, in said County and State, at the intersection of the alley of said block and Center Street in said City, thence running in a northeasterly direction along the line between said Center Street and said lot one, fifty-one feet; thence at right angles in a southeasterly direction, across lots one, two and three, and ten feet of lot four of said block 372, a distance of one hundred feet; thence at right angles in a southwesterly direction fifty-one feet to the line of said alley; thence at right angles in a northwesterly direction along the east line of said alley one hundred feet to the place of beginning, the same being a part of said lots one, two, three, and four of said block 372, of the said City of Pocatello, in said County and State, as the same appears from the official

plat of the Pocatello townsite (now the City of Pocatello) returned to the General Land Office by the Surveyor General of Idaho, and being the premises formerly occupied by the Pocatello Opera House, and now occupied by the Auditorium Theatre Building."

that a copy of said deed is attached hereto, marked "Exhibit A" and made a part of this petition in the same manner as though set forth in haec verba.

VIII.

That the said transfer of real estate by deed as hereinbefore set forth, was made with the intent to hinder, delay and defraud the creditors of the said Alec Murray, Bankrupt.

IX.

That the property, both real and personal, now owned by the said Alec Murray, Bankrupt, either in law or in equity, or both, is insufficient to meet the just and allowed claims of the creditors of said Alec Murray, and that the said Alec Murray, Bankrupt, had no other property, real or personal, out of which to pay the lawful claims and demands of his creditors, except the following described property, to-wit:

Lots 16, 17 and 18, Block 151, of the City of Pocatello, Bannock County, Idaho.

which said property of the said Alec Murray, Bankrupt, is of insufficient value to satisfy in whole or in any considerable part, the claim, and claims of the creditors of the said Alec Murray, Bankrupt; and that the said property is of the value of Three

Thousand Dollars, and that said property is subject to a mortgage, duly recorded in the County of Bannock, State of Idaho, for the sum of $1500.00 in favor of E. C. White and Company.

X.

That on or about the 6th day of March, 1917, the said Alec Murray, Bankrupt, procured a loan of $2725.00 from the First National Bank of Pocatello, Bannock County, Idaho, one of the creditors of the estate of said Alec Murray, Bankrupt, and he, at that time, represented to the said First National Bank that he, the said Alec Murray, Bankrupt, was the then owner of the property particularly described in Paragraph VII, and upon the faith and credit of said representation, by the said Alec Murray, Bankrupt, said loan was made.

XI.

That the said transfer by deed of the property as hereinbefore set forth is fraudulent and void, as against the creditors of the said Alec Murray, Bankrupt, for the reason that the same was transferred for the sole purpose of defeating and making any judgment that the creditors of the said Alec Murray, Bankrupt, might secure, of no value, and to put his said property beyond the reach of an execution; that the consideration named in said deed, as set forth in Exhibit A, hereto attached, of One Dollar is fictitious and that your petitioner is informed and believes and therefore alleged, upon information and belief, that the same is fraudulent and fictitious and that no consideration of any kind

whatever was paid by the defendant herein to the said Alec Murray, Bankrupt, for the said property.

IN CONSIDERATION WHEREFORE, and for as much as your petitioner is remediless in the premises, according to the strict rules of common law and can only have relief in a court of equity, where matters of this kind are properly cognizable, files this petition against the defendant and prays that the said transfer and deed by the said Alec Murray, Bankrupt, to the said James A. Murray, as hereinbefore particularly set forth, may be set aside and be decreed void and of no effect, and that the said defendant James A. Murray be required to retransfer said property by good and sufficient deed to your petitioner, and that in the event of the failure or refusal of said James A. Murray, to so reconvey said property, that the Clerk of this Honorable Court, under the seal thereof, be ordered to reconvey said property by good and sufficient deed to your petitioner, and for such other and further relief as the nature of the case may require and as may be just and equitable and as this Honorable Court shall deem fit and proper.

May it please your honor to grant to this plaintiff a writ of subpoena, directed to the said defendant issued out of and under the seal of this Honorable Court, thereby commanding him at a certain time and under a certain penalty, therein to be named, personally to be and to appear before this Honorable Court, then and there to make full and true answer to this petition and to show cause, if any there may

be, why the prayer of this bill of complaint should not be granted according to the rules and practice of this Court, and to stand to and conform to such orders directed and decreed as may be made against him in the premises and as shall seem meet to equity and your petitioner will ever pray.

J. M. STEVENS,
Attorney for Petitioner,
Residing at Pocatello, Idaho.

United States of America,
District of Idaho, Bannock County.—ss.

H. E. Ray, being first duly sworn deposes and says that he is the duly elected, appointed, qualified and acting trustee of the said Alec Murray, Bankrupt; that he is the petitioner in the above entitled cause of action; that he has read the above petition and knows the contents thereof and believes the facts therein stated to be true.

H. E. RAY.

Subscribed and sworn to, before me, this 27th day of August, 1917.

H. A. BAKER,
(Seal.) Notary Public,
Residence: Pocatello, Idaho.

EXHIBIT "A".

SCHEDULE OF ASSETS AND LIABILITIES.

In the Matter of Alec Murray, Bankrupt.

Creditors Holding Securities	*Value of Securities*	*Amount of Debt*
Bannock National Bank, Pocatello, Idaho, first mortgage		

security on ranch owned by Mr. Steel of Inkom, Idaho; bankrupt contracted note for money loaned	$ 800.00	$1,100.00
Stockgrowers Bank & Trust Co., Pocatello, Idaho, note made by Mrs. Boyd, as maker to bankrupt; due January 1st, 1918, endorsed by Robert Boyd, and by bankrupt; money advanced by bank to bankrupt	1,000.00	919.00
E. C. White & Co., Pocatello, Idaho, first mortgage on property 512 N. 9th Avenue, Pocatello, Idaho, indebtedness for money to bankrupt	1,500.00	1,560.00
		$3,579.00

Creditors Whose Claims are Unsecured:

E. D. Harrison, Jeweler, Pocatello, Idaho, goods sold and delivered. Contracted for in 1916-1917	$ 380.00
Mooney & Douglas, Garage, Pocatello, Idaho, Work, Labor and Service, and materials furnished. Contracted in 1916-1917	381.09
Trist Auto Co., Garage, Pocatello, Idaho, Taxi Hire. Contracted 1917	35.75
Peterson Furniture Company, Furniture, Pocatello, Idaho, goods sold and delivered, 1917	35.00

Idaho Power Company, Electricity, Pocatello, Idaho, Current, 1917	3.07
Mountain States Telephone and Telegraph Company, Phone, Pocatello, Idaho, Phone Service, 1917	4.00
H. H. Whittlesey, Druggist, Pocatello, Idaho, Goods sold and delivered, 1917	3.51
Toggery Clothing Company, Clothing, Pocatello, Idaho, Goods sold and delivered, 1917	38.00
Fargo Wells & Wilson Company, General Merchandise, Pocatello, Idaho. Goods sold and delivered, 1917	25.00
Leon Molinelli, Jeweler, Pocatello, Idaho. Goods sold and delivered, 1916	50.00
Pocatello Electric Supply Co., Supplies, Pocatello, Idaho, Goods sold and delivered, 1917	8.00
Tribune Company, Newspaper, Pocatello, Idaho, Goods sold and delivered, 1916-1917	50.10
Ed. Marston, Rancher, Hill City, Money loaned, 1917	31.50
E. J. Reinfeldt, South Hayes Avenue, Pocatello, Idaho, Money loaned, 1917	50.00
Bannock Abstract Company, Abstracts, Pocatello, Idaho, Abstracts, work, labor and services, 1917	12.75
Parisian Store, North Main Street, Pocatello, Idaho. Goods sold and delivered, 1916-1917	25.00

James A. Murray, c/o Murray's Bank, Butte, Mont. Note part payment purchase money on Water Plant, Pocatello, Idaho, 1914, with interest 28,000.00

James A. Murray, Delinquent Interest on Water Plant Bonds, 1915-1916 ..... 12,000.00

Citizen's Bank, Ltd., Pocatello, Idaho. Note. Money loaned 2,065.00

First National Bank, Pocatello, Idaho, Note. Money loaned 2,800.00

T. J. Murray, 21 E. North St., Wilkesbarre, Pa., Money loaned 1,100.00

Maurice Murray, 21 E. North St., Wilkesbarre, Pa., Money loaned 135.00

Joseph A. Murray, Kalida, Idaho, Money loaned 100.00

W. S. Sams, Pocatello, Idaho, Services 160.00

Greene & Higson, Pocatello, Idaho, work labor 11,000.00

Wm. J. Burns, 1804 L. C. Smith Bldg., Seattle, Washington, Services 312.35

Total $58,805.12

Assets:

Brick House, Studio and 3 lots, 512 S. 9th St., Pocatello, Idaho. Block 151, Lots 16, 17, and 18. Subject to a first mortgage for the sum of Fifteen Hundred ($1500.00) Dollars, made by bankrupt to E. C. White & Co. to secure an indebtedness of $1560.00 as described in Schedule "A" (2) $3,000.00

Choses in Action:

Tom Hall, Water Service, Pocatello, Ida.	$ 41.50
Will Carevelis, Water Service, Pocatello, Ida.	38.00
Mittry & Co., Water Service, Pocatello, Ida.	200.00
H. E. Reddish, Water Service, Pocatello, Ida.	21.00
E. Krussman, Water Service, Pocatello, Ida.	70.00
Murphy & Co., Water Service, Pocatello, Ida.	75.00
Stockgrowers Bank, Pocatello, Idaho, Deposit	5.00
First National Bank, Pocatello, Idaho, Deposit	15.12
Bannock National Bank, Pocatello, Idaho, Deposit	3.30
Citizen's Bank, Ltd., Pocatello, Idaho, Deposit	.80
James H. Brady, Pocatello, Idaho, Water Service, 1913-1914-1915-1916	532.80
Total	$1,002.52

EXHIBIT "B".

This Indenture, Made this 5th day of March, A. D. 1917, between ALEC MURRAY, of the City of Pocatello, State of Idaho, party of the first part, JAMES A. MURRAY, of Butte, Silver Bow County, Montana, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of One

($1.00) Dollar lawful money of the United States of America to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, sell and convey unto the said party of the second part and to his heirs and assigns forever, all of the following described property situate, lying and being in Bannock County, State of Idaho, and particularly bounded and described as follows, to-wit:

Commencing at the northwest corner of lot one of Block Three Hundred and seventy two of the City of Pocatello, in said County and State, at the intersection of the alley of said block and Center Street in said City, thence running in a northeasterly direction along the line between said Center Street and said lot one, fifty one feet; thence at right angles in a southeasterly direction, across lot one, two and three, and ten feet of lot four of said block three hundred and seventy two, a distance of one hundred feet; thence at right angles in a southwesterly direction fifty one feet to the line of said alley; thence at right angles in a northwesterly direction along the east line of said alley one hundred feet to the place of beginning; the same being a part of said lots one, two and three and four of said Block 372, of the said City of Pocatello, in said County and State, as the same appears from the official plat of the Pocatello Townsite (now the City of Pocatello) returned to the General Land Office by the Surveyor General of Idaho, and be-

ing the premises formerly occupied by the Pocatello Opera House, and now occupied by the Auditorium Theatre Building.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, as usually had and enjoyed.

TO HAVE AND TO HOLD, all and singular the said premises together with the appurtenances, unto the said party of the second part and to his heirs and assigns forever.

IN WITNESS WHEREOF, The said party of the first part has hereunto set his hand and seal on the day and year first above written.

ALEC MURRAY.

State of Idaho,
County of Bannock,—ss.

On this 10th day of March in the year nineteen hundred and seventeen, before me Theodore H. Gathe, a Notary Public in and for the State of Idaho, residing at Pocatello, County of Bannock, personally appeared Alec Murray known to me to be the person who executed the within instrument and acknowledge to me that he executed the same.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed by Notarial seal, the day and year in this certificate first above written.

THEODORE H. GATHE,
(Seal) Notary Public.
My commission expires April 4, 1917.
Endorsed, Filed Sept. 1, 1917.
W. D. McReynolds, Clerk.
By Theo Turner, Deputy Clerk.

(Title of Court and Cause.)

No. 205.

In Equity.

SUBPOENA AD RESPONDENDUM.

The President of the United States of America to James A. Murray, Greeting:

You are hereby commanded that you be and appear in said District Court of the United States, at the Court Room thereof, in Pocatello, in said District, within twenty days after service hereof, to answer the exigency of a bill of Complaint exhibited and filed against you in our said Court, wherein H. E. Ray, as Trustee of Alec Murray, Bankrupt, is complainant and you are defendant and further to do and receive what our said District Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to COMMAND you the MARSHAL of said District, or your DEPUTY, to make due service of this our WRIT of SUBPOENA and to have then and there the same.

Hereof not fail.

Witness the Honorable FRANK S. DIETRICH, Judge of said District Court of the United States, and the Seal of our said Court affixed at Pocatello in said District, this first day of September in the year of our Lord One Thousand Nine Hundred and Seventeen and of the Independence of the United States the One Hundredth and 41st.

(Seal) W. D. McREYNOLDS,
Clerk.

By Theo Turner, Deputy Clerk.

Memorandum pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The Defendant is required to file his answer or other defense in the above entitled suit in the office of the Clerk of said Court on or before the twentieth day after service; otherwise the Complainant's Bill therein may be taken *pro confesso*.

Return on Service of Writ.

United States of America,
District of Idaho,—ss.

I hereby certify and return that I served the annexed Subpoena ad Respondendum and certified copy of complaint on the therein-named James A. Murray by handing to and leaving a duplicate of within Subpoena ad Respondendum together with a certified copy of complaint, with James A. Murray, personally, at Blackfoot, in said District, on the 1st day of September, A. D. 1917.

T. B. MARTIN, U. S. Marshal.
By C. H. Arbuckle, Deputy.

Endorsed: Returned and filed Sept. 4, 1917. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy Clerk.

(Title of Court and Cause.)

No. 205.

ANSWER TO BILL.

This defendant reserving all manner of exception that may be had to the uncertainties and imperfections of the bill on file herein comes and answers thereto or so much thereof as he is advised is material to be answered and says:

I.

That defendant has been informed and believes and therefore admits that the petitioner herein, H. E. Ray, is a citizen of the State of Idaho, and a resident of the City of Pocatello, County of Bannock, State of Idaho, and that the property described in said petition is situated in said County and State.

II.

That he, James A. Murray, defendant herein, is a citizen of the State of Montana and a resident of the City of Butte, County of Silver Bow and State of Montana.

III.

That this is a suit of a civil nature in equity between citizens of different states and arises under the laws of the United States and the amount in controversy therein exceeds the sum of Three Thousand ($3000.00) Dollars, exclusive of interest and costs.

IV.

As to all the matters and facts contained in the allegations of paragraph four of plaintiff's bill of complaint, defendant denies any knowledge thereof, but believes the same to be true, but nevertheless does hereby require strict proof as to the truth thereof.

V.

As to the matters and facts alleged in paragraph five of plaintiff's bill of complaint, defendant denies any knowledge thereof, though he believes the same to be true, but nevertheless demands strict proof thereof.

VI.

As to the matters and facts alleged in paragraph six of plaintiff's bill of complaint, defendant denies any knowledge thereof though he believes the same to be true, but nevertheless demands strict proof thereof.

VII.

Defendant admits that on or about the 5th day of March, 1917, Alex Murray of Pocatello, County of Bannock, State of Idaho, did transfer by deed the real estate and improvements described in plaintiff's bill of complaint, to James A. Murray, defendant herein, said property being of a value of about Twenty-five thousand ($25,000.00) Dollars, and defendant admits that the consideration recited in the said deed was One ($1.00) Dollar, lawful money of the United States, but in this regard defendant avers that the said consideration in the said deed so recited was and is merely nominal and formal and that the true and actual consideration for the said deed and transfer so made by the said Alec Murray to the defendant herein was the fulfillment of a trust placed in the said Alec Murray by the said James A. Murray a number of years prior to and preceding the execution of the said deed of March 5, 1917, by which said trust made and entered into by and between the said James A. Murray as trustor, and Alec Murray as trustee, it was stipulated and agreed by and between the said parties that in consideration of the conveyance of the aforementioned property by the said James A. Murray to Alec Murray, the said Alec

Murray was to have and to hold the said property aforementioned in trust for the said James A. Murray; to manage the same as agent of the said James A. Murray; and to care for and protect said property, rendering to the said James A. Murray all rents and profits received from the said property, save and except a certain portion thereof which he, the said Alec Murray, was to reserve and keep for himself as compensation for his services and as reimbursement for any expenses incurred by him in connection with the care of and management of the said property and that by the said trust agreement it was provided that the said Alec Murray was to reconvey all and singular the property so conveyed to him in trust to the said James A. Murray at any time upon request of the said James A. Murray or upon his own volition, if at any time he desired to terminate the said trust. And further answering defendant avers that at the time of the conveyance of said property by the defendant James A. Murray to the said Alec Murray, he received no consideration whatsoever for said transfer and avers that said conveyance was made solely for said trust purposes and none other and the said Alec Murray never at any time owned or held any interest in said property except as hereinabove specifically set forth.

Defendant denies any knowledge or information sufficient to form a belief as regards the time when the said Alec Murray filed his petition in bankruptcy and whether said deed of March 5th, 1917, was made within four months prior thereto or not. Therefore defendant denies said allegation.

VIII.

Defendant denies that the said transfer of property by deed made and executed by Alec Murray to James A. Murray on the 5th day of March, 1917, was so made to hinder, delay or defraud the creditors of the said Alec Murray, bankrupt, but on the contrary defendant alleges that the said transfer by deed was made and executed by the said Alec Murray for the sole and only purpose of terminating the trust placed in him by the said James A. Murray as alleged in paragraph VII of this defendant's answer, and in discharge of the obligation and duty which he owed the said James A. Murray, under and by virtue of said trust, and for no other purpose whatsoever and defendant further says that said deed was made and executed by the said Alec Murray upon an express request made on the 16th day of February, 1917, by James A. Murray, trustor, acting by and through his agent and attorney James E. Murray, and all in accordance with the terms of the said trust aforementioned.

IX.

As to the matters and facts stated in paragraph nine of plaintiff's bill of complaint defendant denies any knowledge thereof but believes the same to be true, but nevertheless requires strict proof of the truth of said allegations.

X.

Answering to the allegations of paragraph ten of plaintiff's bill of complaint, defendant admits that on or about the 6th day of March, A. D. 1917, the

said Alec Murray procured a loan from the First National Bank of Pocatello, Idaho, but avers that the amount of the loan procured at said date did not exceed the sum of One Thousand ($1,000.00) Dollars, and except as herein specifically qualified defendant, on information and belief, admits each and all of the allegations of said paragraph ten of plaintiff's bill of complaint.

XI.

Defendant specifically denies each and every allegation contained in paragraph eleven of plaintiff's bill of complaint wherein plaintiff alleges that the said transfer by deed of the property therein described is fraudulent and void as against the creditors of said Alec Murray, bankrupt, and defendant denies that the reason for making such transfer by deed was for the purpose of defeating or making any judgment that the creditors of the said Alec Murray, bankrupt, might secure, of no value or to put his said property beyond the reach of an execution, and defendant denies that the consideration named in said deed is fictitious or fraudulent, but alleges the fact to be that the transfer of said property by Alec Murray to this defendant, was in good faith and solely for the purpose of discharging the trust as set forth in paragraph VII of defendant's answer, and in this connection defendant avers that the said Alec Murray never paid any consideration or thing of value whatsoever for said property at the time the same was conveyed to him by this defendant, but at all times held the same in trust for the sole benefit

and behoof of this defendant, all of which was well known to the creditors of the said Alec Murray and particularly to the First National Bank of Pocatello, Idaho, at the time of the transaction complained of in the bill of complaint herein.

THEREFORE, Having thus made full answer to all of the matters and things contained in the bill, this defendant prays to be dismissed with his costs in this behalf incurred.

COFFIN & MAGINNIS,
JAMES E. MURRAY,
Attorneys for Defendant.

(Duly verified.)

Endorsed: Filed Sept. 22, 1917.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 205.

DECISION.

DIETRICH, DISTRICT JUDGE:

The plaintiff is the trustee of the insolvent estate of Alec Murray, a bankrupt. The adjudication in bankruptcy was made on June 15, 1917, and this suit was commenced on the 1st day of September, 1917, for the purpose of cancelling a deed of the bankrupt, by which, for the recited consideration of one dollar, he conveyed to the defendant, his uncle, a valuable piece of real estate in Pocatello, Idaho, commonly known and referred to as the "Auditorium." The deed is dated March 5, 1917, and was

acknowledged and recorded five days later. The defendant resides at Butte, Montana, and until recently, under the name of the Pocatello Water Company, was the owner and in control of the water works supplying water to the City of Pocatello and its inhabitants. For some time George Winter and the bankrupt, both residing at Pocatello, were respectively the manager and assistant manager of the water works, and upon the death of the former the latter became manager. The defendant had numerous controversies with the city, (21 Idaho 180, 120 Pac. 812. 226 U. S. 318. 206 Fed. 72; 214 Fed. 214. 23 Idaho 444; 130 Pac. 383), and thereafter, some time prior to the commencement of this action, sold to it the entire system.

Defendant admits that there was no consideration at all for the deed in question, but contends that the bankrupt never had any equitable interest in the property, and only held the legal title in trust for him. It appears that upon June 1, 1907, the Auditorium property stood on the records of the county in the name of E. L. Chapman, defendant's bookkeeper, and upon that day Chapman conveyed it to the Monidah Trust Company, a Delaware corporation, organized apparently as a "dummy" for the defendant's uses. One June 5, 1912, the defendant caused this company to execute a warranty deed conveying the property to the bankrupt, who subsequently (apparently three days later) deeded a one-half interest therein to George Winter, who in turn at a later date reconveyed such interest. During

the long period the bankrupt held the title, there was no notice, suggestion, or intimation from either him or the defendant that he was not the real owner. He appeared so to be, upon the records of the county; he paid the taxes upon, and offered to mortgage, the property, and undoubtedly secured loans from some of his creditors because of his apparent ownership. Not only this, but in a suit brought against the defendant by the City of Pocatello, the bankrupt made an affidavit, in which he expressly asserted his ownership in fee simple, and which was successfully employed by the defendant in establishing his defense. In the instant case the bankrupt was not called as a witness, and it is to be noted that the defendant avoided any direct statement of a trust agreement. After stating that he had "no particular agreement" with the bankrupt at the time the property was conveyed, and that there was nothing said about holding the title in trust, only some general understanding, he was asked by his counsel the question, "At the time you conveyed it (the property) to him (the bankrupt), did you have any understanding that he was to convey it to you or to any one else you might designate," to which he replied, "No, no agreement." Then, to the extremely leading question, "you had an oral agreement, did you not," he responded, "Yes, sir." I didn't think we needed anything more." And upon cross examination he stated that there was no distinct agreement, just a general understanding. He doesn't testify as to what, if anything, he said, or what, if anything, the bankrupt said, nor does he

explain how or why he got such a "general understanding," or attempt to give any reason for having the transfer made by the Mondiah Trust Company, which he had apparently organized for the very purpose of holding the title to such property. He very emphatically denies that the transaction was for the purpose of delaying or evading the execution of a money judgment the city of Pocatello had procured against him. What, then, was the purpose of making the transfer? Why does he withhold the explanation which he could doubtless make of a transaction so manifestly out of the ordinary course of business? By referring to one of the suits between defendant and the city of Pocatello, the one in which the bankrupt made affidavit, a motive, and, I am convinced, the controlling motive, may be found. (See opinion of Idaho Supreme Court, 23 Idaho, 447; 130 Pac. 383, together with dissenting opinion.) It there appears that the city, being dissatisfied with the rates charged by the defendant for water service, desired to have new rates established by a commission, as provided by the laws of the state. Under such laws, the city was authorized to appoint two commissioners and the defendant two, and these four could select a fifth. To be qualified, such commissioners must be taxpayers of the city. Accordingly the city made two appointments, and, the defendant having refused to act, it brought the suit to compel him to do so. After a hearing and considerable delay, the city's petition was granted. (21 Idaho, 812; 226 U. S. 318.) It will be noted that the decision in

the State Supreme Court was rendered on January 3, 1912. It thereupon became obvious that unless this decision should be reversed in the Supreme Court of the United States it would be necessary for the defendant to appoint two commissioners who were taxpayers in Pocatello, and apparently he desired to appoint the bankrupt and Winter as such commissioners. Apparently also the only property they had by which they could qualify as taxpayers was the Auditorium, which the defendant caused to be transferred to the bankrupt on June 5, 1912, after the decision of the Supreme Court of the State, and while the cause was still pending in the Supreme Court or the United States. The City, contending that the bankrupt and Winter were not qualified, brought the proceedings reported in the 23rd Idaho, to test their qualifications. In that proceeding the only construction I can place upon the defendant's answer and upon the affidavits of Winter and the bankrupt, filed and used by him, is that thereby he intended to represent to the court, and desired it to believe, that they, Winter and the bankrupt, and not be, owned the Auditorium, which is doubtless the property referred to in such answer and affidavits. In the absence of any other explanation, therefore, is the inference not irresistible that the defendant caused the Auditorium to be conveyed to the bankrupt and a half interest therein later to Winter, in order that they might qualify as his commissioners? The subject matter with which the commission would deal was of profound interest to

him. He was deeply concerned in having commissioners who would be subservient to his wishes. He could not, and it is presumed he knew he could not, properly qualify Winter and the bankrupt by merely "putting property in their name," of which, however, he continued to be the real owner. Can anyone suppose that he would ever have thought he could succeed in the proceeding in the Supreme Court upon the showing and the claim which he is here trying to make? If the bankrupt and Winter simply held the naked, legal title, with no real interest in the property, the whole transaction was a sham, and the defendant perpetrated a plain fraud upon the state court. Measurably reprehensible through his conduct may have been even in the view I have taken, I am not inclined to think that he intended to, or did, go so far. I am convinced that he intended that the bankrupt should take absolute title to the property, so completely that both he and the bankrupt could, without committing perjury, take oath that it belonged to the latter. He hoped, and may have even expected, that ultimately the bankrupt would reconvey it to him. In consideration of the large interests which he had at stake, he may very well have been willing to take the chance, which, when he considered the relation both of kinship and employment, he probably thought was not great. But it still remains true that he gave the property to the bankrupt without any reservations, conditions or qualifications. It is immaterial that he hoped to get the property back. The giving of a gift with the hope that the donee will at some time return it or its value, does not oper-

ate to create a trust or charge the donee with a trusteeship. For his own purposes the defendant was under the necessity of making an absolute transfer. To have put the property in trust would have been futile. Having in mind the position he had assumed in the State Supreme Court, it is not a matter for surprise that when upon the witness stand here, he was unwilling to say that there was a trust, and was reluctant to testify that there was any express condition of any character. In his representations to the Supreme Court, and in the use of the bankrupt's affidavit of absolute ownership, he in effect disclaimed any interest in and reaffirmed what the deed to the bankrupt legally imports. On March 5, 1917, therefore, the bankrupt was the owner of the property, and was under no legal obligation to convey it to the defendant. Hence the reconveyance was voluntary and was in law a mere gift. It was not to discharge any legal obligation or in pursuance of any trust, for no trust was ever created. Such conveyance, therefore, cannot, any more than any other gift, be sustained as against the creditors of the donor.

A side light is thrown upon the transaction by the later dealings between the parties touching the water works themselves. It seems that subject to an issue of bonds, which he himself held, the defendant conveyed to this same impecunious but convenient nephew, the water works, for an ostensible consideration of $30,000.00, for which he took a promissory note. He didn't sell to the city (such, as I understand, is the import of his testimony) the water

system, but sold to it the bonds, and then got his nephew to give the system to the city, and he in turn forgave the $30,000.00 note.

To recapitulate, the deed from the Moniday Trust Company to the bankrupt makes a prima facie case of absolute ownership in the latter. This is strongly fortified by his declarations and use of the property while in possession and holding the record title, and further by the defendant's own representations and conduct in the city suit. To overthrow the case thus made we have only the vague and guarded statement elicited by a leading question, that there was some general understanding that the property would be reconveyed. In the face of such a record, I am unable to credit the view now urged in the argument that there was an agreement by which the property was impressed with a trust. That the deed which the trustee attacks was without consideration is admitted, and in law must be deemed to have constiituted a gift, and nothing more. As such it was voidable at the instance of the bankrupt's creditors, and hence should be cancelled upon the application of his trustee in bankruptcy. If it be said that a moral consideration is to be found in the fact that the bankrupt paid nothing for the property, and may have always intended to re-deed it to defendant, the reply is that to convert such a moral consideration into a legal one would be to transform a transaction of doubtful propriety into an odious fraud.

Let a decree go in favor of the plaintiff, as prayed.

Filed Dec. 14, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 205.

DECREE.

BE IT REMEMBERED that this cause came on regularly to be heard on the 12th day of October, 1917, at the regular October term of the above entitled court, sitting in the City of Pocatello, Bannock County, State of Idaho; J. M. Stevens, Esq., appearing as counsel for the petitioner and James E. Murray, Esq., and Thos. C. Coffin, Esq., appearing as counsel for the defendant.

Whereupon testimony and documentary evidence was introduced on the part of both petitioner and defendant, from which it appears to the court that all of the material allegations of the petition of H. E. Ray, as Trustee of the Estate of Alec Murray, Bankrupt, are true and supported by testimony and documentary evidence free from all legal objections as to its competency, relevency, and materiality and that the petitioner is entitled to the relief prayed for in his petition.

Now, therefore, on motion of J. M. Stevens, Esq., counsel for the petitioner in the above entitled cause, IT IS ORDERED, ADJUDGED AND DECREED, that the defendant James A. Murray, forthwith convey by good and sufficient deed of conveyance all his right, title and interest in and to the following described property, to-wit:

> Commencing at the northwest corner of lot one of block three hundred seventy-two, of the City of Pocatello, in said County and State, at

the intersection of the alley of said block and Center Street in said City, thence running in a northeasterly direction along the line between said Center Street and said lot one, fifty one feet; thence at right angles in a southeasterly direction, across lots one, two and three, and ten feet of lot four of said block 372, a distance of one hundred feet; thence at right angles in a southwesterly direction fifty-one feet to the line of said alley; thence at right angles in a northwesterly direction along the east line of said alley one hundred feet to the place of beginning, the same being a part of said lots one, two, three and four of said Block 372, of the said City of Pocatello, in said County and State, as the same appears from the official plat of the Pocatello townsite (now the city of Pocatello) returned to the General Land Office by the Surveyor General of Idaho, and being the premises formerly occupied by the Pocatello Opera House and now occupied by the Auditorium Theatre Building."

said property being the property herein in dispute, to H. E. Ray as Trustee of the Estate of Alec Murray, Bankrupt; that in the event the said defendant James A. Murray fails and refuses for thirty days from the date hereof to make said conveyance, that the Clerk of the above entitled court, under his name and the seal of this court forthwith, by good and sufficient deed convey all the right, title and interest of the said James A. Murray in and to the above

described property, to H. E. Ray, as Trustee of the Estate of Alec Murray, Bankrupt, and that the petitioner herein have his costs assessed at $.....

Dated this 5th day of January, 1918.

FRANK S. DIETRICH,
Judge.

Filed Jan. 5, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 205.
STATEMENT OF EVIDENCE.

BE IT REMEMBERED, That the above entitled suit came regularly on for trial before the Hon. Frank S. Dietrich, Judge of the above entitled court, on the 12th day of October, A. D. 1917, at Pocatello, Idaho, James M. Stevens, Esq., appearing as solicitor for complainant and Thos. C. Coffin, Esq., and James E. Murray, Esq., appearing as solicitors for defendant. Thereupon the following proceedings were had and done and the following evidence being all the evidence, submitted at said trial, was introduced, to-wit:

MR. COFFIN: If it please your Honor this case has been reached much sooner than anticipated and I have been unable to reach Mr. James E. Murray, of Butte, Montana, Solicitor for defendant, who has had charge of the case for defendant. I had notified him that the case would not likely be reached before the 20th, and I would therefore respectfully request the court to grant a continuance.

THE COURT: No continuance will be granted, but if Mr. Murray does not arrive during the present hearing he will be permitted to present any evidence he may have before an Examiner to be appointed by the court. We will proceed with the hearing for the present.

FINIS BENTLEY: Produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. STEVENS:

My name is Finis Bentley, I am an attorney-at-law residing at Pocatello, Idaho, and am in partnership with Mr. E. C. White, referee in bankruptcy, in the law business and assist him in taking care of these matters as his clerk. I am familiar with the bankruptcy proceeding against Alec Murray and I have all of the files here.

THE COURT: You needn't identify them separately, I assume. Name them to the stenographer, and they will be deemed to be in evidence then.

THE WITNESS: The creditors' petition to have Alec Murray adjudged an involuntary bankrupt, filed May 14th, 1917, an order upon the bankrupt to furnish schedules of his assets and liabilities, and the schedule of the assets and liabilities of Alec Murray, as filed with the United States District Court Clerk, a correct copy of which is attached to the Bill of Complaint herein.

It is agreed by the parties that the foregoing papers are all in the usual form and are material only

for the purpose of showing the date of the filing of the petition in bankruptcy, to-wit: May 14, 1917; the order of reference and the adjudication in bankruptcy filed June 15, 1917, and it will not be necessary to incorporate these papers in the statement of the evidence upon this appeal.

Q. Was a Trustee appointed in this case?

A. Yes, sir, Mr. H. E. Ray, was appointed as trustee.

THE COURT: Is it admitted that Mr. H. E. Ray is the qualified trustee?

MR. COFFIN: Yes, Your Honor.

MR. STEVENS: There would be no occasion then to introduce either the bond or the order?

THE COURT: No.

THE WITNESS: I have examined the files to ascertain whether Mr. James A. Murray, defendant, made any claim against this bankrupt estate, and find that defendant filed no claim with the referee. The defendant James A. Murray is listed among the creditors of Alec Murray, as a creditor in the sum of $28,000 on one claim and $12,000 on a second claim. The date of the filing of the petition with the Clerk of the United States District Court is May 14, 1917, and with E. C. White,. as referee, June 14, 1917, and the date of the adjudication is June 15, 1917, and was filed of that date.

Witness excused.

HARRY J. FOX, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. STEVENS:

I am Harry J. Fox of Pocatello, Idaho, Deputy Clerk of the Court, and ex-officio auditor and recorder of Bannock County, Idaho. As such deputy I have charge of the records of this county. I have present in court the records of this county pertaining to deeds and transactions between Alec Murray and James A. Murray. Referring to page 88 of Sheriff's Certificate of Sales, I find a Sheriff's Certificate of Sale in the case of E. L. Chapman, Plaintiff, vs. the Auditorium Company, Limited, dated December 5, 1905. The judgment and interest, counsel fees, etc., constituting the consideration, amount to the sum of $6.493, and showing sale of the property involved herein to E. L. Chapman.

Thereupon there was introduced in evidence the following deeds of conveyance affecting the title to the property involved in this suit, to-wit: Deed from W. J. Harvey, Sheriff, to E. L. Chapman, consideration named $6493.00, dated December 8, 1906, and recorded in Book 15 of deeds at page 531; Also deed from E. L. Chapman and Carrie Chapman to Monidah Trust, a corporation, organized under the laws of the State of Delaware and doing business in the State of Montana, consideration being $1.00, said deed being of date January 5, 1907, and recorded in Book 15 of deeds at page 621; Also a deed from E. L. Chapman and Carrie Chapman to Monidah Trust, bearing date June 1st, 1907, consideration being $1.00, conveying the same property to the

Monidah Trust; Also a deed from Monidah Trust the corporation aforesaid to Alec Murray, consideration mentioned $1.00, dated June 5, 1912, conveying the same property above mentioned to Alec Murray, recorded June 8, 1912, in Book 21 of Deeds, at page 550; Also a deed from Alec Murray to George Winter, dated June 8, 1912, conveying a one-half interest in the same property, consideration named $1.00, recorded in Book 23 of Deeds at page 116; Also a deed from George Winter to Alec Murray, dated February 13, 1914, conveying a one-half interest in the same property to Alec Murray, consideration mentioned $1.00, recorded Book 29 of Deeds at page 100. Also a deed from Marion Winter to Alec Murray, dated December 29th, 1914, conveying one-half interest in the same property to the said Alec Murray, consideration mentioned $1.00, recorded in Book 29 of deeds, page 228. Also a further deed dated March 5, 1917, from Alec Murray to James A. Murray conveying to James A. Murray the same property above mentioned, consideration named $1.00, recorded in Book 31 of Deeds at page 462. All of these deeds being of record in the office of the County Clerk and Recorder of Bannock County, State of Idaho, where said property is situated and all of said deeds and records referring to the Auditorium property, which is in question in this proceeding.

THE COURT: It is this last deed that you are seeking to have set aside?

MR. STEVENS: Yes, sir. It is the last deed we are seeking to have set aside. A correct copy of this

deed is attached to the bill of complaint herein and the execution and delivery of the deed is admitted by the answer, and Your Honor will note by the date that it is within the four months' period provided by the statute.

THE COURT: The witness may be excused and permitted to take these records with him.

CARL A. VALENTINE, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. STEVENS:

My name is Carl A. Valentine. I live in Pocatello, and am acquainted with Alec Murray, now bankrupt. I have known him since he came to Pocatello, a number of years prior to the bankruptcy. He did business with our bank. I am president of the First National Bank of this City. I had a conversation with Mr. Murray at the time we advanced money to him, relative to his ownership of the property in question the Auditorium building, in this city.

MR. COFFIN: We object to the question as not proper, on the ground that it is incompetent, irrelevant and immaterial, and cannot in any sense be used against the defendant in this case. I will state, Your Honor, that I am somewhat at sea making that objection. I can't tell just what Mr. Murray's line of defense is, and it puts me in a rather embarrassing position, because most of this is in rebuttal to the case in chief.

THE COURT: Well, inasmuch as it is being

tried before the court, I will permit you to interpose any objection later on. This conversation to which you refer, was that while the legal title was in Mr. Murray, the bankrupt?

MR. STEVENS: It was at a time when he went to the bank to borrow money, and prior to the bankruptcy, and while the title was still in him, and in this conversation he made representations as to his ownership. And we charge fraud, if Your Honor please.

THE COURT: I will hear the testimony, and you may make your objections later, except of course, any formal objection such as to competency of books and papers or as to identification and things of that kind, those ought not to be made later.

THE WITNESS: Mr. Murray came into the bank and asked for a loan, and I told him that I would take the matter up with our loan committee. Before doing so I asked him as to his holdings, and he made the statement that he was the owner of the Auditorium building, and that if the loan committee insisted he would give them a mortgage on the Auditorium for the loan; that he thought that inasmuch as the loan was not a large one, and that it would only be for a short time, that he shouldn't be required to give security on a property that was worth the amount of money that the Auditorium was worth. While we were discussing it our vice-president, Mr. Merrill, was sitting at his desk—our desks were right together, were, in the old place, the same as they are now—and he also entered into the conversation, and

Mr. Murray explained to us both that the property was absolutely his, and if, after it had been discussed by the loan committee, the loan committee insisted on security to the extent of a mortgage, that he would furnish a mortgage upon this property.

We made the loan that he applied for at that time upon the faith of his ownersship of this property, and that is the loan, at least in part, for which we have filed claim against the bankrupt estate. The matter was discussed at different times on account of smaller loans that he had previous to this additional loan, and it was all made up into this last note. It was upon the faith of his ownership of this property that we made the loan.

CROSS EXAMINATION

By MR. COFFIN:

I couldn't give you the exact date of this conversation. I probably could by looking up our records and knowing just the date the loan was made. It was not the date that the present note carries. The note was renewed again at a later date because he failed to take care of it. I wouldn't attempt to estimate about when the conversation was. I can very easily tell from our records when that particular loan was made, within one or two days. I don't think the note was made up the same day it was passed on by the loan committee. I think it was made one or two days later. But our records will show absolutely the day the note was made out. I never had any conversation with James A. Murray about the ownership of the Auditorium.

RE-DIRECT EXAMINATION
By MR. STEVENS:

It was never intimated to me that anyone else had any interest in the Auditorium except Alec Murray, or any claim to any part of it. I had no information only that the property absolutely belonged to him. The records indicated it, and Mr. Murray himself made the statement at different times that he was the absolute owner of the property and I had the records examined.

MR. COFFIN: Will Mr. Murray have the opportunity of cross examining this witness?

THE COURT: Yes he may be recalled when Mr. Murray comes.

MR. STEVENS: Q. Mr. Valentine, in reference to the claim you presented, is that a valid claim against Alec Murray, the bankrupt?

A. Yes, sir, it is due from this bankrupt estate to our bank at this time. It has been filed with the referee and no part of it has been paid. It has also been correctly listed by Alec Murray in his schedule of liabilities.

Witness excused.

D. W. CHURCH, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION
By MR. STEVENS:

My name is D. W. Church. I have lived in Pocatello for thirty-four years. I am Cashier of the Bannock National Bank, and am acquainted with

Alec Murray, and have known him in the neighborhood of ten years probably. I have known him as long as he has been here. He did business with the Bannock National Bank occasionally. Acting for the Bannock National Bank, I made loans to Alec Murray, and have filed a valid claim in the bankruptcy court against the bankrupt estate.

Q. Will you tell the court whether or not this money was loaned upon any representation of ownership of this Auditorium property?

A. Well, not at the time. Mr. Murray did business with us occasionally, and I made him small loans. I remember distinctly of asking him at one time—whether it was in connection with this particular loan or not I don't remember—but he would come in occasionally, and I would loan him some money, and never thought of taking any security from him, only when he offered it. Sometimes he offered it. And I incidentally asked him at one time, "You own the opera house, do you," although I had seen it on the record, and he said, "Yes," he did. And I was glad to loan him money and get his business, and I did it on the strength of his owning good property in Pocatello and being connected with the Water Company, and also a nephew of J. A. Murray.

Q. Would you have been willing, had he not owned property, to have loaned him the money, or were these loans made on the faith of him holding that property and owning it.

A. If he hadn't owned property I probably would have asked him to put up some kind of security. It

was upon the faith of these things we loaned the money. Our claim has not been paid and it is still a valid, subsisting claim against Alec Murray. The obligations are past due.

MR. STEVENS: That is all.

CROSS EXAMINATION

By MR. COFFIN:

I was reasonably well acquainted with Alec Murray, casually. The report around town was that whatever property he had had been given to him by his uncle, James A. Murray. He was a young man, but as to whether or not he was considered fairly fast, I don't know—about like all other young men, I guess. He never drank or gambled that I knew anything about or ever heard about. I placed practically all the faith that I placed in Alec Murray, as a matter of fact, by reason of his relationship with James A. Murray, in connection with his owning the opera house. I never took up with James A. Murray the question of Alec Murray's ownership of this property.

Q. You took nothing but Alec Murray's statements and the general impression that you received from his connection with the Water Company and James A. Murray?

A. I knew he owned the opera house, because I had seen it on record, but I didn't attempt to find out whether his title to the property was as a trustee or in himself. I didn't know anything about that.

Q. You had been satisfied when you found that the records showed title in Alec Murray?

A. He owned the opera house, it was generally conceded.

Q. And you saw by the record that he had paid $1.00 consideration for it?

A. I don't know as that impressed me at all. The only thing is that I was casually going over the books and run across the transaction of James A. Murray to Alec Murray. I wasn't looking for it really, only just happened to see the instrument, and never went into it at all, never cared anything about it, only the fact.

Q. As a matter of fact, Mr. Church, didn't you place most of your faith in Alec Murray and loan him money upon the general faith of his connection with the Water Company, his relationship with James A. Murray, and his apparent prosperity?

A. All that, combined with the fact that the title to the opera house rested in him. I rather thought that he was entitled to the loan of a few hundred dollars. He used to come in and pay his loans off, and I would loan him some more money.

THE COURT: By opera house you mean this auditorium property?

A. Yes, this Auditorium.

THE COURT: Gentlemen, we shall suspend at the present time. I will hear you at two o'clock.

MR. COFFIN: I was going to ask at the conclusion of the plaintiff's case if the court would be willing to permit Mr. Murray to put his testimony in before a referee here, with the privilege of cross examination, and send that to the court as soon as we can get it.

MR. STEVENS: I think Mr. Coffin and I have stipulated, without bringing the assessor or collector or treasurer here, that the record shows this property taxed to Alec Murray, and the receipts are shown as paid by Alec Murray.

MR. COFFIN: For the year 1916 the record shows that Alec Murray paid half the taxes, and it was assessed to Alec Murray.

MR. STEVENS: And in addition to that, the statement which is required to be filed, listing property, was also signed by Alec Murray.

MR. COFFIN. Yes, we will admit that. That is all a matter of record. During all the years it has been assessed to Mr. Alec Murray, and at no time to James A. Murray, the records never show the title to James A. Murray and it would necessarily follow that if Alec Murray held the record title it would be assessed to him.

MR. STEVENS: That is what the record shows.

MR. COFFIN: That is all right with us.

THE COURT: Then it will be admitted that the property was assessed to Alec Murray from 1912 to 1916 inclusive?

MR. STEVENS: Yes.

I. N. ANTHES, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. STEVENS:

My name is I. N. Anthes. I live in Pocatello, and am president of the Citizens Bank of Pocatello. I

am acquainted with Alec Murray and have known him ever since he has been in Pocatello. He did some business with the Citizens Bank, of which I am president. I have been connected with the Citizen's Bank ever since its organization, and ever since Mr. Murray has lived in Pocatello. During the years I have been connected with the bank Mr. Murray received credit at that bank. I never discussed with him the nature of his assets, in making loans to him, but I know from another source of the property in his name. I had Mr. E. C. White look up his property standing. Mr. White stated to me that he had had it looked up. I don't remember whether he said he did it himself or had some one else look it up, and he said the title to the Auditorium was in Alec Murray's name. In making loans to him the Citizens Bank relied upon this as one of the sources upon which it based its estimate of his credit.

Q. Did he have any other property that you know of, Miss Anthes, of any considerable value?

A. Not of any particular value. The first money we let him have was to pay on an automobile that he bought. He had an equity in that. At different time he carried his various accounts with us. He had a personal account, and an Auditorium account, and then he had the Water Company account. I know that he used some of the rents from the auditorium to make payments on the indebtedness to us for money we loaned him to buy the automobile.

Q. I think you didn't just answer my question, as to whether or not the information you received

as to his ownership of the Auditorium was really the basis of his credit with your bank?

A. Well, to some extent; not altogether.

Q. That is one of the things that went to make up his standing with you?

A. That is one of the considerations.

Q. You regarded him as the owner of this property, in making these loans?

A. I did. I have filed our claim in the bankrupt estate for the money due our bank. Our claim has never been paid and it is past due and is a just claim against Mr. Murray. It was demand paper and was due any time we demanded payment.

MR. STEVENS: You may cross examine.

CROSS EXAMINATION

By MR. COFFIN:

I couldn't say how large our loans to Mr. Murray were. I don't remember the original amount without looking it up. I think it was near $2,000. I did not take a mortgage on any of his property. The fact that he was a nephew of James A. Murray had nothing to with our loaning that money. I relied on the fact that he was James A. Murray's nephew and the fact that he was the owner of the Auditorium.

Q. If he hadn't been a nephew of James A. Murray, would you have loaned him $2,000?

A. Well, I don't know about that.

Q. Isn't it a fact, Miss Anthes, that the general impression which prevailed around here was that James A. Murray was back of Alec Murray, and that

was the real moving cause for his receiving credit?

A. No, I don't think so. If I hadn't known that he had this property in his name and figured that I would be able to jump on the property any time I thought it was necessary, he wouldn't have gotten the money to any such amount as he did.

Q. Did you know how be obtained title to the property?

A. I just understood that Mr. Murray made him a present of it.

Witness excused.

MR. STEVENS: I think, Mr. Coffin, you admit in your answer that this property is of the value of $25,000?

MR. COFFIN: Yes, that it is above $3,000.

MR. STEVENS: We rest, Your Honor.

MR. COFFIN: Your Honor. I am satisfied that there is some very good reason for my failure to have heard from Mr. Murray, and I would like, if the Court feels that it consistently can, to permit Mr. Murray to put his testimony in here before a referee, and send the transcript of the testimony to Your Honor, that is, if we can make such a showing as would justify it when he gets here. My telegram yesterday I believe was delivered all right, and I can't understand why I haven't heard from his office at least.

THE COURT: Did you prepare the answer in the case?

MR. COFFIN: He prepared it. We were only in the case as local counsel. He wanted someone here to represent him.

THE COURT: Is there any objection to that, provided it is done very promptly?

MR. STEVENS: We are of course, very anxious to have the matter finished, and if the court is going to extend this courtesy I assume the matter will be taken here. I don't feel that we should be called to Butte to take the testimony, and we feel that under the peculiar condition of the record that we would want to cross examine Mr. Murray.

THE COURT: Yes, of course whatever hearing there would be must be here, so that you will be put to no more expense or trouble that if the trial had gone on today, and it will have to be at the expense, so far as stenographer, etc., is concerned, any extra expense will have to be borne by the defendant. I think I will fix the time to take it not later than next Wednesday, and Evelyn S. Keys is appointed special examiner to take testimony offered by defendant. I will just direct that the cause be submitted upon briefs. The record apparently is very short, so far as anything I have heard is concerned, and that which comes in in the form of depositions before Evelyn S. Keys, as special examiner, I can perhaps examine just as well without argument as with it, so that it will be merely a question of law. You may have ten days after the evidence is closed in which to submit your briefs. You can submit them at the same time, gentlemen.

Adjourned.

That thereafter and pursuant to the order of the court this cause came regularly on for further hear-

ing before Evelyn S. Keys, Special Examiner, by said Court appointed and the following testimony was thereupon offered:

JAMES A. MURRAY, being first duly sworn, testified as follows:

EXAMINATION BY MR. JAMES E. MURRAY:

I am the defendant in this action, James A. Murray. I am acquainted with Alec Murray, the bankrupt in this proceeding. He came to Pocatello sometime prior to 1912. About 1910 or 1911. I first became familiar with the Auditorium property sometime in 1906 or 1907. I am the President of the Monidah Trust Company. The deed introduced in evidence here shows a conveyance from the Monidah Trust Company to Alec Murray in 1912. I ordered it drawn up and signed it as President of the Trust Company. I organized the Monidah Trust Company and own all the stock in the Monidah Trust Company. All but a little stock I placed in other people's hands so they could act as directors. But all the stock is really owned by me.

Q. At the time you executed this deed from the Monidah Trust Company to Alec Murray, what understanding or agreement did you have with him in connection with any trust?

MR. STEVENS: We object to the question on the ground that the record itself would be the best evidence, and in the deed from the Monidah Trust Company to Alec Murray, no reference whatever is made to any trust arrangement, the deed being for a valuable consideration and absolute in form, no

reference whatever being made to any agreement; and for the further reason that any trust agreement under the statutes of Idaho, affecting title to real estate, in order to be valid against bona fide creditors must be in writing, where same affects title to real estate.

A. No particular agreement. I put it in his name for my own convenience.

Q. Was anything said with reference to him holding it merely in trust for you?

A. That was generally understood, that was all. He deeded an interest in it to George Winter at my request, and Mr. Winter made a return deed at my request.

Q. At the time you conveyed it to him, did you have an understanding that he was to reconvey it to you or to any one else you might designate?

A. No, no agreement.

Q. You had an oral agreement, did you not?

A. Yes, sir, I didn't think we needed anything more.

Q. At the time the deed was executed from the Monidah Trust Company, was there any consideration paid by Alex Murray for the deed?

A. Not a nickel—not so much as a nickel.

Q. Was there actually a dollar paid?

A. In form, but he never paid so much as a postage stamp.

Q. The record here show a conveyance to you from Alec Murray in March 5, 1917—did you request him to convey that property back?

A. Yes, sir.

Q. Was there any consideration paid at that time?

A. Not a nickel—not so much as a nickel. As a matter of fact, never at any time did I think for a minute he had as much interest in that property as you have right now.

Q. During the time he held this property in his name, did you know or ever hear of him borrowing any money on the title standing in his name.

A. No, and if I had, he would have reconveyed it right then.

Q. Did any of the officers of these banks who are making claim against his estate at any time inquire of you in reference to his title to that property?

A. No, didn't know he owed them a dollar.

Q. At the time he held this title, was he working as Manager of the Water Company?

A. No, Mr. Winter was manager and he was assistant. After Mr. Winter's death, he was manager. He stepped into Mr. Winter's shoes, and received a salary for work as such Manager.

Q. At the time you first became interested in the Auditorium property, in what way did you become interested there?

A. I acquired stock from some of the stockholders and there was a mortgage on it.

Q. By the First National Bank?

A. Oh, I don't know. I turned it over to a man by the name of Chapman—he was my bookkeeper—for the purpose of straightening up the matter.

Q. Upon the foreclosure of the mortgage, it was bid in by Mr. Chapman, was it not?

A. I think so.

Q. And then how did it come to be conveyed to the Monidah Trust Company?

A. Oh, I was the Monidah Trust Company. I had him make a deed.

Q. Mr. Chapman, you say, was your bookkeeper.

A. Yes, sir, Manager and bookkeeper.

CROSS EXAMINATION BY J. M. STEVENS:

This Auditorium property has never stood on the records of this county in my name. Not in the name of James Murray. I had considerable litigation against the City of Pocatello, and at one time the City of Pocatello acquired quite a large judgment against me in the State Court, but I am not aware of the proceedings had in that case. At that time the record title stood in the name of Mr. Winter for one-half interest, and Mr. Alec Murray for one-half interest. That arrangement was in accordance with my order, and the proceedings had in that case were under my order. Whatever was done in that case by Alec Murray was under my order and under my direction. And whatever was done in that case by Mr. Winter was under my direction and under my order. Wherever there was money involved. This Mr. Chapman was an agent of mine.

I was aware of the fact that Alec Murray deeded part of this property to Mr. Winter. I told him to, and it was reconveyed by my order.

Q. You say there was no consideration for the deed from Murray to you?

A. No, sir.

Q. You knew this property had stood in the name of Alec Murray from about—

A. For about four or five years, from about the 8th of June, 1912, up until it was redeemed to me. Practically five years. I will say this, that several times I had it on my mind to have it transferred but let it go. I knew it stood in his name for practically five years.

Q. You knew that Mr. Murray held himself out as the owner of that opera house property?

A. I did not.

Q. Wasn't that by your own suggestion on account of that judgment being against you in Pocatello?

A. So far from my mind as the moon. That judgment didn't give me that much concern. Never dreamed of such a thing.

Q. The agreement between the Monidah Trust Company and Mr. Murray was not in writing?

A. No writing between us.

Q. No writing between you and Mr. Murray?

A. No, sir.

Q. You said no distinct agreement but just a general understanding.

A. Yes, sir.

Q. You placed the property in his name and allowed it to stand with the understanding that when you wanted it you could get it back?

A. Yes, sir.

Q. And during the time did you know that Mr. Murray paid the taxes on the opera house.

A. He paid it out of the Water Company.

Q. You know that of your own knowledge?

A. Mr. Winter paid it out of the water money and when he was manager, he paid it out of the company money.

Q. You knew that the opera house—I mean the Auditorium property where I have said opera house —was assessed during all these years to Alec Murray?

A. Yes, it must have been.

Q. Did you know, Mr. Murray, that Mr. Alec Murray carried several separate accounts in the Citizens Bank.

A. I did not.

Q. One account for the Water Company, a personal account, and an account for the Auditorium.

A. I did not.

Q. And did you know, Mr. Murray, that Mr. Alec Murray paid the taxes upon this property out of his own personal fund?

A. No, sir. I sent him the taxes for the last two years. I have forgotten how much, but I sent it. The other time these came out of the Water Company. He had no money of his own, buying automobiles and one thing another.

RE-EXAMINATION BY MR. JAMES E. MURRAY:

Q. Mr. Murray, is it unusual for you to carry property situated in different parts of the country in the name of other parties?

MR. STEVENS: I object on the ground that it

would be immaterial and would not be binding upon the claims of these creditors.

A. I believe I have some in your name now which I expect to have deeded back pretty soon. I am going to have those matters straightened up.

Q. You have also had property in Mr. King's name.

A. Yes, sir.

Q. Also in other cities besides Butte?

A. Oh, I have done that right along, down in California, in San Diego, but after this suit I will straighten up things.

Q. Was there any judgment connected with this City litigation here that you attempted to evade in any way?

A. Why, no.

Q. Was there any money judgment they attempted to collect against you?

A. No, sir. They got a judgment—

Q. That was a penalty judgment. Do you know of any money judgment they obtained against you—any judgment for money?

A. No, if they had I would have paid it. I was always able to pay it. I had so many lawsuits I didn't pay much attention to them. Winter was always mixed up. Full of whiskey, I expect.

Witness excused.

JAMES E. MURRAY, being first duly sworn, testified on behalf of the defendant, as follows:

DIRECT EXAMINATION by
MR. COFFIN:

Q. Your name is James E. Murray?

A. Yes.

Q. How long have you been Mr. James A. Murray's attorney?

A. About 16 years. Since 1901.

Q. Were you Mr. Murray's attorney at the time of the foreclosure of the mortgage on the Auditorium property by Mr. Chapman?

A. Yes. But not connected with the foreclosure of that suit. Some other attorneys. Terrell, I believe.

Q. After the foreclosure of that suit and after the title reached Mr. Chapman, were you familiar with the matter?

A. Yes, sir; about the time that matter was closed the Monidah Trust Company had been organized under the laws of the State of Delaware. The company was organized by him for the purpose of holding title to property in various parts of the country, and he instructed Mr. Chapman to convey this property to the Monidah Trust Company.

Q. Then, calling your attention to the deed, a certified copy of which is in evidence, from the Monidah Trust Company to Mr. Murray, were you attorney for Mr. James Murray?

A. Yes, sir.

Q. And you were an officer of the Monidah Trust Company at that time?

A. Director and Vice President.

Q. State whether you know the circumstances surrounding the giving of that deed to Mr. Alec Murray.

A. I remember the occasion. Mr. Murray merely directed me to draw up a deed from the Monidah Trust Company to Alec Murray, and the deed was drawn up and executed by Mr. Murray as President of the Trust Company, conveying the property to Alec Murray, and at that time there was an understanding that Alec was to deed it back to Mr. Murray or to anyone he might name.

Q. Was Alec Murray present at that time?

A. Not at the time the deed was prepared, but he had been coming back and forth between Pocatello and Butte, and the matter was discussed on one or two different occasions that the property was to be re-conveyed. I was not present at all of the conversations between Mr. James A. Murray and Alec Murray, but I remember it was discussed at some time I was present. At the time this deed was given I was acting as James A. Murray's attorney. And as such, I had charge of the transaction. I prepared the papers and talked to Alec about it on one or two different occasions, and at the time it was reconveyed, I wrote to Alec and told him to reconvey.

At the time it was conveyed to Alec Murray it was with the understanding, as stated by Mr. James A. Murray, that he was to hold the property for him and reconvey it to him or to anyone whom he might name, and I believe he told him then, or some time after, to convey one-half of it to Mr. Winter, and

some time after he did convey one-half of it to Mr. Winter. At that time Mr. Murray was largely interested in Pocatello property, Mr. Alec Murray working for him then. He was associated with Mr. Winter, and after Mr. Winter's death was in charge of the property. I was also acting as Mr. Murray's attorney at the time of the reconveyance.

Q. I wish you would state the circumstances at that time.

MR. STEVENS: Object as immaterial.

A. Here is the letter from Alec enclosing the deed to me.

Q. Do you wish it admitted as evidence?

A. Don't think it is necessary.

Q. I wish you would state the circumstances surrounding the reconveyance.

A. I wrote him a letter asking him to reconvey the property to Mr. Murray and he did so and enclosed the deed in this letter to me after it was recorded.

Q. And during all the time that the record title stood in the name of Alec Murray, you have known of his estate in that property.

A. Yes, sir.

Q. Did he ever own the equitable title to it?

A. He never did at any time.

Q. Did you know of him holding himself out to anyone in Pocatello or elsewhere as being the equitable owner of that property?

A. I never knew of him doing so. He never stated so to me, but as to what he stated to anybody

else, I don't know. In fact he wrote to me recently and said he did not, that he never had made such representations.

CROSS-EXAMINATION by
MR. STEVENS:

Q. You have been practicing law some sixteen years, Mr. Murray?

A. Since 1901.

Q. And drew the deed from the Monidah Trust Company to Alec Murray?

A. Well, I am not sure, but I think I did.

Q. You also drew the answer to the petition filed in this action?

A. Yes.

Q. And in that answer you state that this property stood in the name of James A. Murray and was by him conveyed?

A. Yes, that was an oversight on my part. I had forgotten about the Monidah Trust Company.

Q. In fact, your further investigation shows you it never stood in Mr. Murray's name?

A. Yes.

Q. And the Monidah Trust Company is a Delaware corporation?

A. Yes, but I am sometimes confused, as the Monidah Trust Company is really James A. Murray, and we speak of the property as belonging to Mr. Murray, as he has complete control of it.

Q. Were you present at the time a trust was created between Alec Murray and James A. Murray?

A. I was present.

Q. Can you give the conversation?

A. Nothing more than that Mr. Murray said he would convey the property to him and it should stand in his name, but at any time he wanted the property reconveyed, he would expect him to do so.

Q. You knew, then, of your own knowledge, that this property stood in the name of Mr. Murray for several years, until March, 1917?

A. Yes.

Q. And you knew that Alec deeded one-half interest in this property to Mr. Winter?

A. Yes, sir, at Mr. Murray's request, he did.

Q. You state he never claimed an equitable title to this property.

A. He told me so.

Q. You are not in a position to say he never did make such representations?

A. Of course not.

Q. You never placed on record a trust deed or agreement between these parties?

A. No, sir.

Q. And if there was an agreement it was merely oral?

A. Yes, sir.

MR. STEVENS: In connection with the testimony of James A. Murray, I desire to call the Court's attention to the suit of the City of Pocatello vs. James A. Murray, and especially that part of the opinion of the Court found upon page 453 touching the affidavits of Alec Murray and James A. Murray, and at the bottom of page 464, relative to the ownership of the Auditorium Theatre in Pocatello.

CARL VALENTINE—Recalled.
RECROSS-EXAMINATION by
MR. JAMES E. MURRAY:

The transactions I had with Alec Murray cover a period of time a little less than two years. I would say about a year and nine or ten months. We had conversations with him at different times. Alec was in a habit of coming in and asking for loans and then would come in and take up part of them and sometimes all of the loans, and at the different times we were discussing affairs as a banker will with his clients. It was at the last time the question came up but I had been discussing the matter with Alec, and also the water plant. Do you recall the time I met you and he at the time the City purchased the water plant, well, just at that time he told me when the transfer was completed he would get $40,000.00 when the bonds were taken care of, according to the arrangement with his uncle. At the last time when this note was increased, when he became the purchaser of this stock over here, at that time he said, if you want me to I will give you a mortgage on this property, but really it is only $2700.00 or $2800.00 and something, and such a small amount to place a mortgage on the property under the circumstances, as it will be running for only such a short time.

Q. Then you believed him when he told you he expected to get $40,000.00 from the water works plant?

A. Yes. He had charge of the plant. The plant was in his name, was it not?

Q. Yes, subject to the bonds.

A. Here is the way he put it up to me, Mr. Murray: A portion of this obligation is with the old Chronicle. That loan was made by Mr. Standrod and Ireland previous to our purchasing the First National Bank, and is included in this note. And I asked them at the time we purchased about that Chronicle note, and they said Mr. James A. Murray owns the Chronicle, and just a small amount is loaned to take care of this Chronicle business. I don't know just how much the Chronicle debt was. They made some payments on it—Phillips and Alec. They were both on the note. Alec asked us to release Phillips, that the Chronicle belonged to his uncle and he wanted to release Phillips, who was leaving. Then he came to us and said he was making some repairs to the Auditorium and there is also a portion of that debt in the note. I wouldn't say whether that was before the Chronicle note was changed or not. I think that is a little over two years ago. It wasn't very many months after we had purchased the First National Bank. I have no records here to show what portion of our claim constitutes the Chronicle debt. At the time of the last renewal, when we discussed the title of this property we extended an additional credit of $1,000.00.

Q. Previous to that time you were not extending him any credit on account of the ownership of the Auditorium building?

A. Sure we were. We had discussed it at different times, and we put it right up to him when he

asked for this increase. He said the increase was only for a short time and we asked what security he could offer us, and he told us he could give this security on the building, but didn't like to do it for so short a time. I said, why do you want to buy this stock? He said, "I have a letter from my uncle that he will let me have $75,000.00 or $100,000.00, which I will loan out on building loans in the city, and I am going east in a little while and I want to get control of this Loan Association."

Q. In extending him credit, you depended upon all his statements and extended him credit on the strength of all his statements?

A. Yes, we extended him credit on the strength of the property holdings which he claimed and in addition, what he expected to get from Mr. Murray. We had to listen to his statements. We figured if he owned all that property without a mortgage on it, he was entitled to this credit. We would not have given him this credit, but we knew the records showed he had this property.

MR. JAMES E. MURRAY: The defendant objects to all of the testimony of Carl Valentine, relating to the transactions between Alec Murray, Bankrupt, and the First National Bank; particularly with reference to the loans made by said bank to Alec Murray, upon the ground and for the reason that all of said testimony is incompetent, irrelevant, and immaterial and is not within the issues in this suit and doesn't prove or tend to prove any of the issues herein. Further, for the reason that this testimony fails

to show that the loan of this bank, made the basis of this claim against the bankrupt's estate, was made in reliance upon the title of this property standing on the records in the name of Alec Murray.

Witness excused.

MISS I. N. ANTHES—Recalled.

RECROSS-EXAMINATION by
MR. JAMES E. MURRAY:

Q. Miss Anthes, when did you first commence having dealings with Alec Murray with reference to loans?

A. Several years ago, at the time he bought the first car I loaned him money. I think probably about four years. I don't remember the amount of the original loan.

I never discussed with him at any time whether he was the owner of the Auditorium property, but I had it looked up by my attorney. I don't remember just when it was. When he began to increase it and I thought it was getting too big. We didn't ask for any security at any time, and never took any security. I don't know anything about the White transaction.

Q. You never asked him for any security; never asked him to give the Auditorium property as security?

A. No, sir.

MR. JAMES E. MURRAY: The defendant objects to all of the testimony of I. N. Anthes, relating to the transactions between Alec Murray, Bankrupt, and the Citizen's Bank, particularly with reference

to the loans made by said bank to Alec Murray, upon the ground and for the reason that all of said testimony is incompetent, irrelevant, and immaterial and is not within the issues in this suit and doesn't prove or tend to prove any of the issues herein. Further, for the reason that this testimony fails to show that the loan of this bank, made the basis of its claim against the Bankrupt's estate, was made in reliance upon the title of this property standing on the records in the name of Alec Murray.

The defendant objects to the testimony of I. N. Anthes, with reference to the matter of having Mr. E. C. White look up the title to the Auditorium property and with reference to the witness making loans to the said Alec Murray, based upon his title to said property, for the reason that said testimony is hearsay.

Defendant further objects to the testimony of Miss Anthes, with reference to the extension of credit to the said Alec Murray, for the reason that it appears from her testimony that said credit was not extended in reliance upon the title to said property standing in the name of Alec Murray.

Witness excused.

JAMES A. MURRAY—Recalled.

RE-DIRECT EXAMINATION by
MR. JAMES E. MURRAY:

Q. In the Bankrupt's schedule here of debts there is included an alleged credit of yours for $25,000.00. Do you make any claim against the bankrupt?

A. I do not—he isn't worth anything.

Q. At the time of the sale of the water works

property, did you tell him if he transferred the property to the City you would not hold him for any obligation on his note which he had executed for the property?

A. I didn't tell him in those words. I told him I was selling the bonds and if he couldn't do anything we would call everything square.

Q. Also an item of about $12,000.00 back interest on bonds.

A. Nothing on that either.

Q. At this time you do not claim any debt against Alec Murray?

A. I am satisfied he owes me money, but I don't claim anything. It's no use.

Q. I mean on these two items?

A. Oh, no.

RECROSS-EXAMINATION by
MR. J. M. STEVENS:

Q. You said you didn't claim anything because he couldn't pay it if you did?

A. Yes, sir.

MR. JAMES E. MURRAY:

Q. Did you mean that on these two items, Mr. Murray?

A. No, they are wiped out by themselves.

Witness excused.

MR. MURRAY: At this time, pursuant to the ruling of the Court, we desire to interpose on behalf of defendant, the following objections to the testimony submitted on the part of the plaintiff:

The defendant objects to all of the testimony of D. W. Church, relating to the transactions between Alec

Murray, Bankrupt, and the Bannock National Bank, particularly with reference to the loans made by said bank to Alec Murray, upon the ground and for the reason that all of said testimony is incompetent, irrelevant, and immaterial and is not within the issues in this suit and doesn't prove or tend to prove any of the issues herein. Further, for the reason that this testimony fails to show that the loan of this bank made the basis of its claim against the Bankrupt's estate, was made in reliance upon the title of this property standing on the records in the name of Alec Murray.

The defendant objects to the introduction of evidence in this case of the deeds and records pertaining to the title to the Auditorium property and objects to all testimony of Carl Valentine with reference to the examination of the record and title and his reliance upon the record showing title to the Auditorium property standing in the name of Alec Murray. Also the testimony of D. W. Church with reference to the title standing in the name of Alec Murray and with reference to his examination of the records and reliance upon the records showing title standing in Alec Murray. Also to testimony of I. N. Anthes with reference to reliance upon the records showing title to the Auditorium property standing in the name of Alec Murray. Upon the ground and for the reason that said testimony is not within the issues in this case; and for the reason that in the complaint or petition filed herein, it is expressly alleged that in extending the credit mentioned and re-

ferred to in the said petition or complaint, to Alec Murray, reliance was had only upon the representations of the said Alec Murray.

EXPLANATION BY MR. JAMES E. MURRAY:

I desire to have the record show the reason I was not here for the trial of this action at the time it commenced before the Federal Court.

I received notice from Mr. Coffin that the case would come on for trial October 8, 1917, and shortly before that I was required to go to the coast, to Seattle, on business, and while in Seattle, I wired to Mr. Coffin to find out when the case would be reached for trial, in order to prepare to come on for the hearing.

On October 6th, I received a telegram from Mr. Coffin, stating that the case would be the last case on the term and I immediately wired back to ask him what would be the exact date, and in answer received a wire on October 6th, saying some time between the 15th and 20th, "cannot be more definite."

I received that message on the 6th and concluded there would be no hurry and that I would have plenty of time to get to Pocatello by the 15th. I had no more word from the case until my return to Butte, on last Saturday night, October 13th, when I found a telegram there awaiting me, stating that the case was to come up for the 12th, and also found a letter from Mr. Coffin explaining the circumstances and stating that the Court proceeded with the case, with the understanding that I would be permitted to put in testimony of the defendant before a referee.

This explains my failure to be present on the 12th of October, when the case came on for trial.

(Title of Court and Cause.)

It is hereby stipulated by and between the parties hereto that the foregoing statement of evidence is a full, true and correct transcript of and constitutes all of the evidence and proofs of the respective parties herein.

It is further stipulated and agreed that the petition in bankruptcy, the order of reference, and order adjudicating Alec Murray a bankrupt, introduced by complainant, are omitted by consent, said papers being introduced only for the purpose of showing the adjudication in bankruptcy, the appointment of complainant as trustee and the date of the filing of the petition in bankruptcy, to-wit: May 14, 1917, all of which said facts are hereby admitted.

It is further stipulated and agreed that the deeds showing the transfers between the bankrupt Alec Murray and the defendant herein need not be set forth in full, it being hereby agreed that said deeds are in the usual form, properly acknowledged and recorded and show the transfers involving the property in question and the dates thereof as stated in the testimony of Harry J. Fox, Recorder of Bannock County, Idaho.

It is further stipulated and agreed that the testimony of defendant's witnesses may be incorporated in question and answer form as set forth in the foregoing statement of evidence.

It is further stipulated and agreed that the foregoing statement of evidence may be approved, settled and allowed and filed herein as the statement of

evidence on appeal without further notice of time or place of approval.

J. M. STEVENS
Solicitor for Complainant.
JAMES E. MURRAY,
Solicitor for Defendant.

The foregoing statement of evidence and proceedings in the above entitled cause is in due time presented to the undersigned Judge of this Court and is hereby approved as true, correct and complete and properly prepared and the parties having stipulated that the testimony of defendant's witnesses might be incorporated in question and answer form, the court does hereby approve the same as proper and necessary for the presentation of this cause on appeal and said statement of evidence is hereby approved as true, correct and complete and is ordered filed herein.

Dated this 31st day of January, A. D. 1918.

FRANK S. DIETRICH,
Judge of the U. S. District Court, District of Idaho.

Endorsed: Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 205.

PETITION FOR APPEAL AND ALLOWANCE.

To the Honorable Frank S. Dietrich, District Judge of the United States for the District of Idaho, Eastern Division.

The above named defendant, James A. Murray, feeling himself aggrieved by the decree made and en-

tered in this cause on the 5th day of January, A. D. 1918, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and defendant prays that an appeal be allowed and that a citation issue as provided by law, and that a transcript of the record and proceedings herein duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made, and desiring to supersede the execution of the decree herein your petitioner here tenders bond in such amount as the court may require for such purpose and prays that with the allowance of the appeal a supersedeas be had.

Dated this 31st day of January, A. D. 1918.

JAMES E. MURRAY,
Solicitor for Defendant.

The foregoing petition for appeal is hereby granted and the appeal is allowed in the above entitled cause and it is ordered that said appeal shall operate as a supersedeas upon the appellant filing a bond in the sum of $5000.00 with sufficient surety or sureties to be conditioned as required by law.

FRANK S. DIETRICH,
Judge of the District Court of the United States for the District of Idaho.

(Service acknowledged.)

Endorsed: Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 205.

ASSIGNMENT OF ERRORS.

Comes now the defendant James A. Murray, and files the following assignment of errors, in support of his appeal from the decision and decree made and entered herein by this Honorable Court on the 5th day of January, A. D. 1918, and respectfully shows that said decision and decree is erroneous and unjust to defendant, for the following reasons, to-wit:

I.

That the court erred in finding and deciding that the conveyance of the property involved in this suit by the defendant James A. Murray to the bankrupt Alec Murray, was an absolute conveyance in fee simple without any restrictions, conditions or qualifications and that no trust was ever made or created, obligating the bankrupt to reconvey said property to the defendant.

II.

The Court erred in finding and deciding that the conveyance from the bankrupt, Alec Murray, to the defendant, James A. Murray, was voluntary and in law a mere gift.

III.

That the Court erred in finding, deciding and decreeing that the conveyance of the property involved in this suit by the defendant James A. Murray through the Monidah Trust, a corporation, controlled by defendant, was an absolute conveyance of

the title to the property involved in this suit in fee simple and that there was no trust agreement or obligation made or created by the parties obligating the said bankrupt Alec Murray, to reconvey said property to the defendant herein.

IV.

That the court erred in finding and deciding that no competent or sufficient proof was offered or introduced in evidence to establish a trust or other agreement or obligation on the part of the bankrupt to reconvey the property involved in this suit to the defendant, James A. Murray.

V.

That the court erred in not finding, deciding and decreeing that the defendant herein, James A. Murray, was the owner of the equitable estate or title in the property involved in this suit.

VI.

The Court erred in not finding, deciding and decreeing that the legal title to the property involved in this suit was conveyed to and held by the bankrupt, Alec Murray, in trust for the defendant herein.

VII.

That the court erred in not finding, deciding and decreeing that the defendant James A. Murray, was entitled to a reconveyance of the property involved in this suit and that the reconveyance of said property by the bankrupt was made in compliance with and in performance of said trust and is valid as against the creditors of the bankrupt.

VIII.

That the court erred in ordering and entering a decree herein in favor of the plaintiff and against the defendant for the reason that the testimony conclusively establishes the fact that the property involved in this suit was held in trust by the bankrupt, Alec Murray, for the benefit of the defendant herein and that defendant was entitled to a reconveyance of the same.

IX.

That the court erred in ordering and entering the decree herein in favor of the defendant and against the defendant for the reason that the relief granted by said decree was not warranted by the pleadings and was not within the issued framed by the pleadings.

X.

The court erred in not finding and rendering its decision herein in favor of the defendant and against the plaintiff and in failing to decree the defendant herein to be the equitable owner of the property involved in this suit for the reason that the uncontradicted testimony establishes the fact that the defendant was at all times the owner of the equitable title or estate in said property and that he caused the legal title to be conveyed to the bankrupt Alec Murray, without any consideration and upon the express agreement and understanding that the said bankrupt was to hold the legal title to said property in trust for defendant herein.

WHEREFORE, defendant prays that the said decree be reversed and the District Court directed to enter its decree herein in favor of the defendant and against the plaintiff.

JAMES A. MURRAY,
Solicitor for Defendant.

(Service Acknowledged.)

Endorsed: Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 205.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we James A. Murray, as principal, and I. N. Anthes and George A. Greene, as sureties, acknowledge ourselves to be jointly indebted to H. E. Ray, as Trustee in bankruptcy, appellee in the above entitled cause, in the sum of $5000.00, conditioned that,

WHEREAS, on the 5th day of January, A. D. 1918, in the District Court of the United States for the District of Idaho, in a suit depending in that court wherein H. E. Ray as trustee of the estate of Alec Murray, bankrupt, was plaintiff and James A. Murray was defendant, numbered on the equity docket as 205, a decree was rendered against the said James A. Murray, and the said James A. Murray, having obtained an appeal to the Circuit Court of Appeals, Ninth Circuit, and files a copy thereof in the office of the Clerk of the Court to reverse the said decree, and a citation directed to the said H. E. Ray

as trustee of the estate of Alec Murray, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the 2nd day of March, A. D. 1918, next.

NOW, if the said James A. Murray shall prosecute his appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to be and remain in full force and virtue.

JAMES A. MURRAY.
I. N. ANTHES.
GEO. A. GREENE.

State of Idaho,
County of Bannock.—ss.

I. N. Anthes and Geo. A. Greene, being first severally duly sworn, each for himself, deposes and says: That he is the surety named in the above and foregoing bond and that he is worth the sum specified in said bond, exclusive of property exempt from execution or forced sale.

I. N. ANTHES,
GEO. A. GREENE.

Subscribed and sworn to before me this 28th day of January, A. D. 1918.

FINIS BENTLEY,
Notary Public in and for the State of Idaho, residing
(Seal.) at Pocatello.
My commission expires Dec. 27, 1920.
(Service acknowledged.)

The foregoing bond on appeal is hereby approved this 31st day of January, A. D. 1918.

FRANK S. DIETRICH,
Judge of the District Court of the United States for the District of Idaho.

Endorsed: Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)
No. 205.
PRAECIPE.

To W. D. McReynolds, Clerk of the United States District Court, District of Idaho.

You will please prepare a transcript on appeal herein including therein the following papers, to-wit:

Final record herein including the bill of complaint, subpoena in equity, answer of defendant, final decree and certificate of the clerk. Also including in said transcript on appeal, statement of evidence and stipulation of parties with reference thereto; and order of the court approving and settling the same; the petition for appeal and order allowing the same; assignment of errors and acknowledgement of service thereof; bond on appeal and order approving the same, citation of appeal and acknowledgement of service thereon; the opinion of the court herein and also this praecipe and certificate of the clerk.

Dated this 28th day of January, A. D. 1918.

JAMES E. MURRAY,
Solicitor for Defendant.

Due service of the foregoing Praecipe admitted this 28th day of January, A. D. 1918, and the right to file a Praecipe herein indicating additional portions of the record to be included in said transcript is hereby waived and consent is given that the said transcript may be immediately prepared, containing the portion of said record indicated in the above and foregoing Praecipe.

J. M. STEVENS,
Solicitor for Plaintiff.

Endorsed: Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

In the District Court of the United States for the District of Idaho, Eastern Division.

H. E. RAY, as Trustee of the Estate of ALEC MURRAY, Bankrupt, Plaintiff,

vs.

JAMES A. MURRAY, Defendant.

205

CITATION OF APPEAL.

THE PRESIDENT OF THE UNITED STATES to H. E. Ray, as Trustee of the Estate of Alec Murray, bankrupt, and to John Stevens, Esq., his solicitor:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within Thirty (30) days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, where-

in James A. Murray is the appellant and H. E. Ray as Trustee of the estate of Alec Murray, bankrupt, is the appellee, to show cause if any there be, why the said decree in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS, the Hon. Frank S. Dietrich, Judge of the United States District Court for the District of Idaho this 31st day of January, A. D. 1918, and of the Independence of the United States the one hundred and forty-second.

FRANK S. DIETRICH,
Judge of the District Court of the United States for the District of Idaho.

Service of the foregoing Citation of Appeal acknowledged and copy thereof received this 31st day of January, A. D. 1918, and further notice or citation is waived.

J. M. STEVENS,
Solicitor for Plaintiff and Appellee.

Filed Jan. 31, 1918.
W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest: W. D. McREYNOLDS,
(Seal.) Clerk.

CLERK'S CERTIFICATE.

United States of America,
District of Idaho.—ss.

I, W. D. McReynolds, Clerk of the United States District Court for the District of Idaho, do hereby certify that the above and foregoing transcript pages 1 to 85, inclusive, is a full, true, correct and complete transcript of the record and all proceedings had in the above entitled cause, including the bill of complaint, subpoena in equity, answer of defendant, final decree and certificate of final record; also the statement of evidence and stipulation of parties with reference thereto and order of court approving and settling the same; petition for appeal and order allowing the same, assignment of errors and acknowledgement of service thereon; citation on appeal and acknowledgement of service thereon; bond on appeal and order approving the same, also including the opinion of the court and all proceedings had in said cause, as fully as the same remains on file and of record in my office.

I further certify that the cost of the record herein amounts to the sum of $121.50, and that same has been paid by appellant.

WITNESS my hand officially and the seal of said court at Boise, in the District of Idaho, this 18th day of February in the year of our Lord, Nineteen Hundred and Eighteen and of the Independence of the United States the One hundred and forty-second.

W. D. McREYNOLDS,
Clerk of the District Court of the United States for the District of Idaho.

(Seal.)

No. 3126

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In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

APPELLANT'S BRIEF

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

BRIEF OF APPELLANT

STATEMENT OF CASE.

This suit was brought for the purpose of setting aside a certain conveyance made by the bankrupt Alec Murray to James A. Murray, appellant herein, defendant below.

The property in controversy is known as the "Auditorium property," a valuable block in the City of Pocatello, Idaho. The property was acquired by the appellant James A. Murray, some time in 1906 (Trans. page 40-54). The title was originally taken in the name of E. L. Chapman, a bookkeeper and agent of appellant (Trans. page 56-57). It was

afterwards transferred to Monidah Trust, a Delaware corporation, organized and controlled by appellant (Trans. page 54). On June 5, 1912, appellant caused this property to be conveyed to the bankrupt. The bankrupt, Alec Murray, is a nephew of appellant and was at the time of the transaction herein referred to employed by appellant as assistant manager of the Pocatello Water Works System, the property of appellant (Trans. page 54). For a short time an undivided one-half interest in this property stood in the name of George Winter who was likewise employed by appellant in the conduct of the Pocatello Water Works System (Trans. page 41). While the legal title thus stood in the name of the bankrupt, it appears from the evidence that he acquired some extravagant notions, and lived somewhat beyond his means, creating the indebtedness shown by the schedule of liabilities attached to the complaint herein (Trans. pages 14-17). On March 5, 1917, the property was reconveyed to the appellant James A. Murray (Trans. page 41).

It is this reconveyance to appellant that is attacked in this proceeding. It is alleged in the bill of complaint that the property in question was by the bankrupt on the 5th day of March, 1917, conveyed to the appellant herein; that the consideration specified in said transfer was wholly fictitious and that in fact no consideration whatever was paid by defendant for said property and that the transfer was and is fraudulent and void.

Among other allegations in the petition it is also alleged that the First National Bank, one of the creditors of the bankrupt on the day following the reconveyance of this property by the bankrupt to James A. Murray, made a loan to the bankrupt at which time the bankrupt represented that the property in question belonged to him and it is alleged in the complaint that this loan was made upon the faith and credit of such representations. Upon this complaint the court below is asked to direct a reconveyance of the entire property in question to the trustee for the benefit of the general creditors of the bankrupt.

THEORY OF THE CASE.

The theory upon which this proceeding is prosecuted is not quite clear, but it would appear from the main allegations of the complaint that this suit is prosecuted upon the theory that the property in question became and was the absolute property of the bankrupt, and that it was conveyed by the bankrupt to the appellant herein without any valid consideration and with the intent and purpose of defrauding the general creditors of the bankrupt. This was the theory adopted by the court below as will appear from the decision and opinion filed in the case. In the decision the learned judge makes the following findings: "The deed from the Monidah Trust Company to the bankrupt makes a *prima facia* case of absolute ownership in the latter. This is strongly fortified by his declarations and use

of the property while in possession and holding the record title, and further by the defendant's own representations and conduct in the city suit."

The evidence, however, wholly fails to sustain the theory upon which the case was decided. There is no conflict in the evidence, but the trial court failed to give proper effect to the undisputed facts in the case.

THE EVIDENCE.

There is no testimony in the records disputing the contention of the appellant that the property in question was conveyed to Alec Murray in trust with the express understanding and agreement that it was to be reconveyed upon demand. The only testimony on this point was given by the appellant herein and by his attorney who attended to the matters pertaining to the preparation of deeds, etc. The appellant on this point testifies as follows:

> "I am the defendant in this action, James A. Murray. I am acquainted with Alec Murray, the bankrupt in this proceeding. He came to Pocatello some time prior to 1912. About 1910 or 1911. I first became familiar with the Auditorium property some time in 1906 or 1907. I am the President of the Monidah Trust Company. The deed introduced in evidence here shows a conveyance from the Monidah Trust Company to Alec Murray in 1912. I ordered it drawn up and signed it as President of the Trust Company. I organized the Monidah Trust Com-

pany. All but a little stock I placed in other people's hands so they could act as directors. But all the stock is really owned by me.

"Q. At the time you executed this deed from the Monidah Trust Company to Alec Murray, what understanding or agreement did you have with him in connection with any trust?

"A. No particular agreement. *I put it in his name for my own convenience.*

"Q. Was anything said with reference to him holding it merely in trust for you?

"A. That was generally understood, that was all. He deeded an interest in it to George Winter at my request, and Mr. Winter made a return deed at my request.

"Q. At the time you conveyed it to him did you have an understanding that he was to reconvey it to you or to anyone else you might designate?

"A. No, no agreement.

"Q. You had an oral agreement, did you not?

"A. Yes, sir; I didn't think we needed anything more.

"Q. At the time the deed was executed from the Monidah Trust Company, was there any consideration paid by Alex Murray for the deed?

"A. Not a nickel—not so much as a nickel.

"Q. Was there actually a dollar paid?

"A. In form, but he never paid so much as a postage stamp.

"Q. The record here shows a conveyance to you from Alec Murray in March 5, 1917—did you request him to convey that property back?

"A. Yes, sir.

"Q. Was there any consideration paid at that time?

"A. Not a nickel—not so much as a nickel. As a matter of fact, never at any time did I think for a minute he had as much interest in that property as you have right now. * * * I was aware of the fact that Alec Murray deeded part of this property to Mr. Winter. I told him to, and it was reconveyed by my order.

"Q. You say there was no consideration for the deed from Murray to you?

"A. No, sir.

"Q. You knew this property had stood in the name of Alec Murray from about—

"A. For about four or five years, from about the 8th of June, 1912, up until it was redeeded to me. Practically five years. I will say this, that several times I had it on my mind to have it transferred but let it go. I knew it stood in his name for practically five years.

"Q. You knew that Mr. Murray held himself out as the owner of that opera house property?

"A. I did not.

"Q. Wasn't that by your own suggestion on account of that judgment being against you in Pocatello?

"A. So far from my mind as the moon. That judgment didn't give me that much concern. Never dreamed of such a thing.

"Q. The agreement between the Monidah Trust Company and Mr. Murray was not in writing?

"A. No writing between us.

"Q. No writing between you and Mr. Murray?

"A. No, sir.

"Q. You said no distinct agreement but just a general understanding?

"A. Yes, sir.

"Q. You placed the property in his name and allowed it to stand with the understanding that when you wanted it you could get it back?

"A. Yes, sir.

"Q. And during the time did you know that Mr. Murray paid the taxes on the opera house?

"A. He paid it out of the Water Company.

"Q. You know that of your own knowledge?

"A. Mr. Winter paid it out of the water money and when he was manager, he paid it out of the company money.

"Q. You knew that the opera house—I mean the Auditorium property where I have said opera house—was assessed during all these years to Alec Murray?

"A. Yes, it must have been.

"Q. Did you know, Mr. Murray, that Alec Murray carried several separate accounts in the Citizens Bank?

"A. I did not.

"Q. One account for the Water Company, a personal account for the Auditorium?

"A. I did not.

"Q. And did you know, Mr. Murray that Mr. Alec Murray paid the taxes upon this property out of his own personal fund?

"A. No, sir. I sent him the taxes for the last two years. I have forgotten how much, but I sent it. The other time these came out of

the Water Company. He had no money of his own, buying automobiles and one thing another.

"RE-EXAMINATION BY M. JAMES E. MURRAY:

"Q. Mr. Murray, is it unusual for you to carry property situated in different parts of the country in the name of other parties?

"A. I believe I have some in your name now which I expect to have deeded back pretty soon. I am going to have those matters straightened up.

"Q. You have also had property in Mr. King's name?

"A. Yes, sir.

"Q. Also in other cities beside Butte?

"A. Oh, I have done that right along, down down in California in San Diego, but after this suit I will straighten up things."

(Transcript, pages 54-60.)

James E. Murray, called as a witness on behalf of appellant, gave testimony on this point. He testified in substance:

That the conveyance of the property in the first instance to the bankrupt, Alec Murray, was made with the express understanding and agreement between the parties to the transaction that it was to be held in trust, and was to be reconveyed to appellant upon demand; that at the time of the conveyance to Alec Murray, he was acting as appellant's attorney, and as such had charge of the transaction,

prepared the papers and talked to Alec Murray about it on different occasions, and at the time of the reconveyance by the bankrupt to the appellant, the witness wrote to bankrupt requesting the reconveyance.

(Transcript, pages 61-65).

No testimony was offered on behalf of complainant to rebut this proof. During the course of the trial, however, counsel for complainant made the following statement:

> "MR. STEVENS: In connection with the testimony of James A. Murray, I desire to call the court's attention to the suit of the City of Pocatello vs. James A. Murray, and especially that part of the opinion of the court found upon page 453 touching the affidavits of Alec Murray and James A. Murray, and at the bottom of page 464, relative to the ownership of the Auditorium Theatre in Pocatello.
>
> (Transcript, page 65.)

> "It appears from the opinion of the court in the litigation referred to, that a controversy was going on between James A. Murray, the owner of the Pocatello Water Works system, and the City of Pocatello, and among other things, proceedings were intsituted by the City of Pocatello to compel Mr. Murray to appoint commissioners to represent him as owner of the Water Company in the matter of establishing rates; that to be qualified as a commissioner, a person must be a taxpayer; that Mr. Murray appointed George Winter and Alec Murray, the bankrupt, herein,

> as commissioners to represent him in this proceeding relating to the establishment of rates; that in this proceeding, the bankrupt and said George Winter testified that they were the owners of the property in question; that they were taxpayers and qualified to act as commissioners. No other testimony was offered by complainant relating to this matter."

It will be observed that the record contains considerable testimony offered by complainant with a view of establishing an *estoppel* in favor of the First National Bank of Pocatello in support of the allegation contained in the complaint by which it was alleged that the First National Bank loaned the bankrupt certain money upon the strength of his declared ownership of the property in question. Upon the submission of the case in the court below, however, this theory seems to have been abandoned, and it was sought to establish, as heretofore stated, that the conveyance by James A. Murray to the bankrupt was an absolute and unqualified conveyance and constituted a gift; that the property became and was the absolute property of the bankrupt, and constitutes a part of the bankrupt's estate, and, as will be observed from the opinion and decision of the court, it was so found in the court below.

SPECIFICATION OF ERRORS.

Comes now the defendant, James A. Murray, and files the following assignment of errors, in support of his appeal from the decision and decree made and entered herein by this Honorable Court on the 5th day of January, A. D. 1918, and respectfully shows that said decision and decree is erroneous and unjust to defendant, for the following reasons, to-wit:

I.

That the court erred in finding and deciding that the conveyance of the property involved in this suit by the defendant James A. Murray to the bankrupt Alec Murray, was an absolute conveyance in fee simple without any restrictions, conditions or qualifications and that no trust was ever made or created, obligating the bankrupt to reconvey said property to the defendant.

II.

The court erred in finding and deciding that the conveyance from the bankrupt, Alec Murray, to the defendant, James A. Murray, was voluntary and in law a mere gift.

III.

That the court erred in finding, deciding and decreeing that the conveyance of the property involved in this suit by the defendant James A. Murray through the Monidah Trust, a corporation, controlled by defendant, was an absolute conveyance of the title to the property involved in this suit in fee simple and

that there was no trust agreement or obligation made or created by the parties obligating the said bankrupt Alec Murray, to reconvey said property to the defendant herein.

IV.

That the court erred in finding and deciding that no competent or sufficient proof was offered or introduced in evidence to establish a trust or other agreement or obligation on the part of the bankrupt to reconvey the property involved in this suit to the defendant, James A. Murray.

V.

This court erred in not finding, deciding and decreeing that the defendant herein, James A. Murray, was the owner of the equitable estate or title in the property involved in this suit.

VI.

The court erred in not finding, deciding and decreeing that the legal title to the property involved in this suit was conveyed to and held by the bankrupt, Alec Murray, in trust for the defendant herein.

VII.

That the court erred in not finding, deciding and decreeing that the defendant James A. Murray, was entitled to a reconveyance of the property involved in this suit and that the reconveyance of said property by the bankrupt was made in compliance with and in performance of said trust and is valid as against the creditors of the bankrupt.

VIII.

That the court erred in ordering and entering a decree herein in favor of the plaintiff and against the defendant for the reason that the testimony conclusively establishes the fact that the property involved in this suit was held in trust by the bankrupt, Alec Murray, for the benefit of the defendant herein and that defendant was entitled to a reconveyance of the same.

IX.

That the court erred in ordering and entering the decree herein in favor of the plaintiff and against the defendant for the reason that the relief granted by said decree was not warranted by the pleadings and was not within the issues framed by the pleadings.

X.

The court erred in not finding and rendering its decision herein in favor of the defendant and against the plaintiff and in failing to decree the defendant herein to be the equitable owner of the property involved in this suit for the reason that the uncontradicted testimony establishes the fact that the defendant was at all times the owner of the equitable title or estate in said property and that he caused the legal title to be conveyed to the bankrupt Alec Murray, without any consideration and upon the express agreement and understanding that the said bankrupt was to hold the legal title to said property in trust for defendant herein.

ARGUMENT AND AUTHORITIES.

It will appear from the foregoing statement of the case that the property in question should be held for the benefit of the creditors who extended credit to the bankrupt, relying on his apparent ownership, was abandoned, and the decision of the court is based upon the proposition that the conveyance of the property by the appellant to the bankrupt was an absolute and unqualified conveyance and constituted an unconditional gift; that the property rightfully belongs to the bankrupt's estate and its reconveyance by the bankrupt to the appellant herein was made without consideration and for the sole purpose of defeating the rights of the creditors of the bankrupt.

If that is the correct theory upon which this suit is prosecuted, it is incumbent upon the plaintiff to establish the actual ownership of the property in the bankrupt and that the conveyance to James A. Murray was made without consideration. These facts being established the conveyance would, of course, be fraudulent against the creditors and the court would be justified in accordance with the prayer of the complaint in setting aside and declaring void the transfer and requiring a reconveyance of the property to the trustee in bankruptcy. If this is the theory upon which the case is to be considered, it is obvious in view of the conceded facts in the case that the court erred in rendering its decree in favor of the plaintiff. The testimony wholly fails to estab-

lish the material allegations of the complaint. On the contrary it does affirmatively establish the fact that the appellant was at all times the equitable owner of the property in question and that the bankrupt held the bare legal title in trust for appellant. In recognition of this trust the bankrupt reconveyed the property to appellant by deed dated March 5, 1917, a copy of which is attached to the complaint herein (see Trans. pages 17-18).

The testimony concerning the circumstances under which the title to this property was placed in the name of the bankrupt and the circumstances under which the title to this property was placed in the name of the bankrupt and the circumstances attending the reconveyance of the same is set forth quite fully in the statement of the case and there is a complete absence of any showing of fraud in connection with these transactions. It is apparent from the undisputed testimony in the record that no consideration was necessary to support the reconveyance by the bankrupt to the rightful owner. In so conveying the property to the rightful owner the bankrupt was merely carrying out the terms of the parol trust. He held the bare legal title to the property and had no beneficial interest in it whatever, therefore the reconveyance by him to the equitable owner is not fraudulent.

As said in the case of Martin vs. Thomas:

> "If the debtor holds the bare legal title to the property for another and has no beneficial

> interest therein, it cannot, in the absence of elements of estoppel be reached and subjected to the payment of his debts, and therefore a conveyance thereof by him to the equitable owner or a third person at the request of the equitable owner, is not fraudulent as against his creditors. * * * It follows that where one who holds real or personal property under a parol trust makes a declaration of trust in accordance with the parol agreement or conveys the property in accordance therewith, his creditors, in the absence of elements of estoppel cannot attack the declaration or conveyance as fraudulent and subject the property to the satisfaction of their claims."
>
> Martin vs. Thomas, et al., 144 Pac. 684.

In the case of Silvers vs. Potter, the Supreme Court of New Jersey considering a situation similar to the case at bar, said:

> "The important question is in regard to the character of the interest which Lewis had in this property. The deed from his mother to himself is, on its face, an absolute conveyance of the property with covenants of warranty.
>
> "It is claimed that parol evidence is not admissible to establish the fact that this was a conveyance of this property, by the mother to the son, to be held in trust by him for her and his brothers and sisters.
>
> "If the effort on the part of the defendants at this time, was to establish such a trust, then the contention of the complaint would be well

founded; neither the mother, nor any one claiming under her, could under the statute of frauds, in the face of this absolute conveyance, establish, by parol testimony, that it was only a conveyance of the property to Lewis in trust. Nor could Lewis, under the statute of frauds make an effective parol declaration of trust of the lands conveyed to him by such a deed. But it was entirely competent for Lewis, so long as he held the title to the property, to have made a bona fide declaration of trust in writing, and, if so made, the same would have been valid against his heirs and creditors.

"If he had not made this deed, but had bona fide executed a proper declaration of trust, it would have been good against these creditors, even if made after their attachments had been levied. Gardner v. Rowe, 2 Sim. & S. 346; S. C. on appeal, 5 Russ. 258. A lease was granted to W., who afterwards committed an act of bankruptcy and then executed a deed stating that his name had been used in the lease in trust for R., and declaring the trust accordingly. A bill was filed on behalf of the creditors of W., under the commission in bankruptcy, claiming the lease as part of his estate, and the court directed an issue to try whether W's. name was used in the lease as a trustee for R. The jury having found a verdict in the affirmative, it was held that the declaration of trust was valid, though executed after bankruptcy, and that the lease did not pass to W's. assignee. The question in such a case, is, of course, whether the estate was in fact conveyed in trust.

"The statute of frauds covering this point is a rule of evidence. It provides that the trust must be manifested or proved by a sufficient writing, but a trust can still be created by parol. It cannot be enforced in a court while it rests in parol alone, because the statute intervenes and says that it must be manifested or proved by writing. There is, however, nothing which requires that the writing should be executed at the time that the trust is created—in fact, it may continue to rest in parol and not be declared until the trustee dies, and then may be so declared by his will."

Silvers vs. Potter, 48 N. J. Eq., page 539.

The property of a third person held in trust by the bankrupt is no part of the bankrupt's estate. In order to avoid a transfer under the provisions of the bankruptcy act it is necessary to show that the transfer was made with the intent and purpose on the part of the bankrupt to hinder, delay or defraud creditors. A transfer of real property held in trust to the rightful owner is not fraudulent.

Lockren v. Rustan, et al., 81 N. W. 60;
Phillip vs. Kleisman, 27 Am. Bankruptcy Rep. 195;
Sillman vs. Todd, 27 Am. Bankruptcy Re. 127;
Brandeburg on Bankruptcy, Sec. 797;
Young vs. Allen, 207 Fed. 318.

If the property is transferred before any creditors fasten any lien on it, it does not constitute any part

of the bankrupt's estate. In order to hold it as a part of the bankrupt's estate the creditors must have asserted a claim upon it before the title was transferred to the rightful owner.

Young vs. Allen, 30 Am. Bankruptcy Rep. 261;
York vs. Castle, 201 U. S. 344;
26 Sup. Ct. Rep. 481;
Lockren vs. Rustan, et al., 81 N. W. 60.

The trustee in bankruptcy takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt.

In the case of Cottrell vs. Smith, et al., the Supreme Court of Iowa discussing the subject said:

> "We proceed to consider whether the conveyances were fraudulent, and, if not, whether there is any other ground upon which the plaintiff's claim can be sustained. There is no pretense that any consideration moved to the grantor. If the conveyances can be sustained, they must be sustained upon the ground upon which the grantor put them in her testimony, and that is that the land rightfully belonged to the heirs and not to her. She did not probably mean that they had a legal or equitable right to the land in the sense that they had a right which they could enforce, but that they had a moral right. That they had such right it appears to us cannot be denied. Now where an act is done in the dis-

Gottstein v. Wist - 61 Pac. 715.
Martin v. Remington - 76 N.W. 614.
Bank v. Higginbottom - 34 U.S. 48 - 9 L. Ed. 46.

charge of a moral obligation it cannot be deemed fraudulent. No person is bound to hold for his creditors what in good morals does not belong to him but to another. The legal title, then of the grantees supported as it is by a moral right, must be held to be good."

Cottrell vs. Smith, et al., 18 N. W. 865.

If there had been no bankruptcy proceedings against Alec Murray the property involved in this proceeding would have been recognized as trust property as between the bankrupt and James A. Murray the real owner. There was no fraud or intention to do anything immoral or injurious to any one. Under the arrangement the bankrupt was to hold the property temporarily with the understanding that it was to be re-transferred upon request. The transaction then is wholly unattended by fraud or any indication of fraud. It was the plain duty of Alec Murray to re-transfer the property as he did and it does not constitute a fraudulent transfer and comes under none of the provisions of the bankruptcy act rendering the conveyance void as against the trustee.

But the court below says that appellant had an object in view in placing the title of the property in question in the bankrupt; that he desired to qualify the bankrupt and one George Winter as commissioners in certain water rate proceedings pending in the state court and that to qualify as such commissioners these persons were required to be taxpayers of the municipality and that to permit the appellant to now

assert that the title was vested in the bankrupt conditionally would constitute a fraud.

We submit that this contention cannot be sustained. If the title still remained in the bankrupt it is no doubt true that appellant would not be permitted to establish the trust by parol. But here the trust has been terminated by a reconveyance executed by the trustee before the institution of the bankruptcy proceedings. There is no proof that the facts were otherwise than as testified to by the witnesses for defendant. The testimony of defendant is consistent throughout. Long before the controversy in this case arose defendant had permitted the title to the same property to stand for a while in the name of E. L. Chapman (Trans. pages 40-56), and in fact in numerous instances has done the same thing with other property (Trans. pages 59-60).

There is not the slightest proof of fraud on the part of appellant. If, however, a claim of fraud could be based upon any of the acts of appellant, how can it be contended that the creditors of the bankrupt should receive any advantage by reason of said alleged fraud. Only the person defrauded is entitled to assert a claim of fraud. Here the creditors were in nowise injured by the act of appellant in placing the title of this property in the bankrupt. They were not parties to the transaction, were in nowise connected with it and can claim no rights under it.

Estoppel is available only to parties and privies.

Simpson vs. Pearsons, 99 Am. Dec. 577;
Blanks vs. Klein, 53 Fed. 438;
Deery vs. Cray, 72 U. S. (5 Wall), 795;
18 L. ed. 653;
Branson vs. Wirth, 17 Wallace 32;
21 L. ed. 566;
First National Bank of Lincoln, Nebraska vs. Duncan, 101 Pac. 992;
28 L. R. A. (N. S.) 327-330 and foot notes;
Wilson vs. Phoenix Powder Mfg Co., 52 Am. State Rep. 895.

Estoppel is not available to strangers or third persons.

Jackson vs. Brinkerhoff, 3 Johnson cases (N. Y.), 101.

The general rule is that title to land cannot be extinguished or transferred by acts in *pais* or by oral declarations. The only exception is active fraud.

Kirk vs. Hamilton, 102 U. S. 68-76.

We submit, however, that no fraud was committed by appellant in the transaction in question. To constitute a person a taxpayer, it is not necessary that it be shown that he is the owner of the equitable as well as the legal title.

"In the case of Lasityr v. City of Olympia, 61 Wash. 651, 112 Pac. 752, the Supreme Court of Washington, in defining "taxpayer" when applied

to the qualification of a juror, said: 'We are inclined to agree with the respondent that a taxpayer within the meaning of this statute, is a person owning property in the state, subject to taxation and on which he regularly pays taxes."

"The Court of Appeals of Missouri, in the case of State ex rel. Sutton v. Fasse, 71 S. W. 645, defines 'taxpayer' as 'a person owning property in the state subject to taxation, and on which he regularly pays taxes."

The laws of Idaho make no requirement that the taxpayer must be the owner of a perfect unencumbered title or that he must be the owner of the equitable as well as the legal estate. In the case of Tracey vs. Reed the Circuit Court for the District of Oregon has held that the owner of property for the purpose of taxation is a person having the legal title or estate therein and not one who by contract or otherwise has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself.

Tracey vs. Reed, 38 Fed. 69.

Reconveyance by Bankrupt was not fraudulent as against creditors except such as might have extended credit on the strength of the apparent ownership. Jackson v. Brown 15 Johns. 263. Bank v. Sturgis - 81 S.W. 550.

COMPLAINANT'S PROOF.

As heretofore stated complainant has offered no proof tending in any degree to establish fraud on the part of defendant. During the introduction of defendant's proof, however, counsel for complainant called the attention of the court to the suit in the state court entitled "City of Pocatello vs. James A. Murray" (see Trans. page 65). The files and proceedings in that case were never offered in evidence and defendant was given no opportunity to examine the matters referred to in that case and had no opportunity of offering evidence in explanation or rebuttal.

We submit that the court erred in considering the files and records in that case as proof herein. It was wholly incompetent as evidence in this case.

CAN DEFENDANT'S TITLE BE DIVESTED AND THE PROPERTY HELD FOR CREDITORS UNDER THE DOCTRINE OF ESTOPPEL?

It may be contended, that the petition establishes an equitable right on the part of the First National Bank of Pocatello to hold the property in the hands of the defendant James A. Murray, liable to the extent of the credit which was extended to the bankrupt as the apparent owner of the title and that the petition must therefore be upheld to the extent at least of holding the property for the purpose of col-

lecting the indebtedness of the First National Bank. This equitable right is sought to be enforced under the doctrine of estoppel. This doctrine is announced by some text writers in the following language:

> "Where the true owner of property holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, *and innocent third parties are thus led into dealing with such apparent owner, or person having such apparent power of disposition,* they will be protected."
>
> 16 Cyc. 773-774.

This simply means that in dealing with real property a person is protected from the claims of the real owner if the person purporting to be the owner holds the record title. The true owner is estopped from setting up a title as against one obtaining title through any one in whose name title stands of record. It does not mean, that the true owner may through the doctrine of estoppel be divested of his title by one who has secured no actual title, claim or lien on the property, relying on the apparent ownership. In other words, if the apparent owner while carrying the legal title transfers to a third party some right, title or lien in the property, or if such third party procures a lien on the property so recognized by law, such third party will then be protected in his ownership against the claim of the true owner under the doctrine of estoppel.

In the case before the court, however, the title has been transferred to the true owner and no lien or title has ever been obtained by the First National Bank or any other creditor through the apparent owner. But it is sought by the doctrine of estoppel, merely, to divest the true owner of his actual title for the benefit of the First National Bank, who claims that it extended credit on the strength of the apparent ownership of the bankrupt. This is carrying the doctrine of estoppel to a degree wholly inconsistent with fundamental principles. In order to invoke the doctrine of estoppel complaint must have established some legal title or lien fastened on the property through the holder of the apparent title and this being shown the real owner will then be estopped from setting up his title.

While the property stood in the name of Alec Murray it could undoubtedly have been seized by his creditor, as said by Mr. Wait in his work on fraudulent conveyances: "Until the creditors of the rendee acquire actual liens upon the property they have no legal or equitable claims in respect to it higher than or superior to those of the grantor."

Wait on Fraudulent Conveyances, Sec. 398, Sec. 73;
Davis vs. Graves, 29 Barb. (N. Y.), 285;
Powell vs: Ivy, 88 N. C. 256;
Keal vs. Larson, 83 Ala. 146;
Lillis vs. Gallagher, 39 N. J. Eq. 94.

Under the circumstances here the reconveyance by the bankrupt to James A. Murray is valid between the parties themselves and valid as against the general creditors of the bankrupt, except such of them as may have acquired some lien against the property while in the hands of the apparent owner. As to such a creditor the true owner may be estopped from asserting his ownership when to do so causes an innocent creditor to suffer and such a creditor is allowed to hold the property to the extent of satisfying his lien. It must be conceded under the evidence in this case that the First National Bank never asserted any claim against the property while the same was held by the bankrupt and acquired no judgment or lien against it in the hands of the bankrupt and is therefore under the authorities not in position to hold the property as against the true owner.

In the case of Wilson vs. Harris, the Supreme Court of Montana, said: "Property of a debtor subject to execution in possession of an assignee under a conveyance void to creditors may not be reached through proceedings of equity until such creditors have obtained a specific lien on the property."

Wilson vs. Harris, 21 Mont. 374.

The same court in a later case, said: "In an action to set aside a conveyance of both real and personal property as fraudulent towards creditors, the complaint does not show that plaintiff has a lien on such property. It fails to state a cause of action

for such relief and an objection to the admission of any evidence thereunder should be sustained."

Also see:

Raymond vs. Blancgrass, 36 Mont. 449;
Wheeler & Motti Co. vs. Mood, 141 Pac. 665.

This is also the rule with reference to mortgages void as against creditors. It is only such creditors as have secured liens against the property covered by the void mortgage that are in position to have the property brought into the bankrupt's estate.

In Re New York Co., 110 Fed. 514.

In the case of Marston vs. Dresen, the Supreme Court of Wisconsin has held that where a wife has intrusted her separate property to her husband to invest and manage in his own name and to transfer it to her when she so desired, and not having been transferred to the husband for the purpose of giving him credit and no representations having been made, and the wife not knowing that credit was given on the faith of such apparent title, she is not estopped to claim it as her own.

Marston vs. Dresen, 85 Wis. 530;
55 N. W. 896.

In the case of Dodd et al. vs. Bond, the court held that a reconveyance by the holder of a legal title to the quitable owner for the purpose of protecting it from the claims of creditors is not fraudulent where

the creditor has not acquired a lien upon it prior to the reconveyance. The court in that case saying:

> "One who takes merely what is his own is not punished for considerations which may operate upon the mind of the party who gives it up. In this case the wrongful holder of the property was performing a legal and moral duty; was doing that which in the eyes of the law ought to have been done, in placing the property where it belonged. We hold therefore that the conveyance is good as against these creditors."
>
> Dodd et al. vs. Bond, 14 S. E. 581.

The leading case on the subject now under consideration is the case of Bicocchi vs. Casey-Swasey Co., decided by the Supreme Court of Texas. In that case a very extensive opinion was filed discussing the principles of law applicable here, and the court arrives at the conclusion that the conveyance of property to the rightful owner before the cerditors acquired any lien by judgment or otherwise is valid and good as against creditors. In conclusion the court says:

> "The estoppel applied in this case goes beyond the limits of the rules of law, and the further proposition that one who extends credit to the apparent owner of property, relying upon false statements of ownership, acquires a fixed right in such property would lead to many complications and produce more injustice than that which has aroused the indignation and enlisted the sympathies of judges in the cases cited, leading

them to expressions which are more elegant than accurate. We will give some illustrations of what we regard as probable consequences of that rule. Let us suppose that before Mazza conveyed the Bicocchi, a creditor of the former, who did not know of the existence of the property in question and did not rely upon it in giving credit, had levied an attachment upon it. Such attachment, levied before the conveyance was made, would have held the property as against Bicocchi. If the defendants in error, holding the same debts, contracted upon the same representations by Mazza and under the same belief as to the truth of those representations, had subsequently to the first attachment, but also before the conveyance to Bicocchi, levied a writ of attachment upon the same property, claiming priority over the first attaching creditors, because their debt was contracted upon their faith in the statement of Mazza, and with reference to his ownership of this particular property, could they have maintained their claim of priority over the prior attaching creditors? We think clearly they could not. If both attachments had been levied in the same order after the conveyance was made to Bicocchi, the first attaching creditor's right would be superior to the second attachment, but would be inferior to the right of the grantee; and yet, according to the holding of the court of civil appeals in this case, the second attachment, which could not hold the property as against the first attachment, would be declared to have a right of foreclosure against Bicocchi, whose right would be superior to that of the first attaching creditor.

These inconsistencies and complications show that the proposition upon which this judgment rests is at variance with the well-settled rules of law by which alone courts may determine upon the rights of citizens."

"Judicially looked at from any standpoint, this case finally resolves itself into the question first stated: Was Mazza under moral obligation to convey to Bicocchi the property in accordance with his agreement, and did that moral obligation constitute such a consideration as would in law be sufficient to sustain a deed of conveyance when made in pursuance of such agreement? Having reached an affirmative answer to that question, the case must be determined in favor of the validity of the conveyance made by Mazza to the plaintiff in error."

Bicocchi vs. Casey-Swasey Co., 42 S. W. 963, 66 Am. St. Rep. 875.

In In Re McConnell, it was held that where a bankrupt and another purchased property jointly taking the deed in their joint names, but the money being advanced by the other under a parol agreement to sell the property and divide the profits after reimbursing the other for the purcahse price, the creditors had no claim superior to the equitable owner of the property; that the creditors had no lien or claim superior to the other party growing out of the fact that the deed failed to disclose two actual interests and the trustee was only entitled to one-half of the surplus.

In Re McConnell, 28 Am. Bank Rep. 659.

The case of In Re McIntosh, decided by the Circuit Court of Appeals, 9th Circuit, is no different in principle than the case at bar. In that case one Costigan on May 11, 1903, borrowed from a bank $9,000.00 and as security executed deeds to certain property in the form of absolute conveyances. These deeds were not placed on record. On the 16th day of September, 1904, Costigan filed a petition in bankruptcy and was adjudicated a bankrupt on the 19th day of September, following. On the 21st day of September, 1904, three days after Costigan was adjudicated a bankrupt, the deeds previously executed By Costigan were filed for record. It was claimed that the failure to place the deeds on record operated as a fraud upon the creditors of Costigan, who gave credit to him subsequently to the execution of the deeds and prior to the recording of the same. In disposing of the case the court said:

> "In the bill under consideration there is not even an averment of an agreement on the part of the defendants to withhold from record the deeds in question, much less any direct averment that the deeds were withheld from the record by the agreement of the parties for the fraudulent purpose of giving to the bankrupt a false credit, or that the grantee concealed the fact that such deeds were made with fraudulent intent to deceive and defraud the creditors of the grantor. We agree with the district judge that it is not sufficient to simply allege probative facts from which it may be argued that there was such agree-

ment or active concealment. Rogers v. Page, supra, and cases there cited. See, also, Blennerhasset v. Sherman, 105 U. S. 118, 26 L. Ed. 1080; Curry v. McCauley (C. C.), 20 Fed. 583; Smith v. Craft (C. C.), 17 Fed. 705; Stephens v. Sherman, Fed. Cas. No. 13,369-A."

In Re McIntosh, 150 Fed. 546.

In the course of its opinion in the last cited case the court refers to the case of Rogers vs. Page, 140 Fed. 596, and cites with approval the following extraction from that case:

"There is a distinction between a mere negligent failure to record a mortgage or deed, and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute a fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith according to the particular situation of the parties, and the intent as indicated by all of the facts and circumstances of the particular case."

Rogers vs. Page 140 Fed. 596.

INSUFFICIENCY OF THE PROOF.

Viewed as a suit to set aside the conveyance as fraudulent there is an entire lack of proof to justify a decree for petitioner. The evidence as to the trust capacity in which the property was held by the bankrupt stands absolutely unquestioned. In the case of Tarsney vs. Turner the U. S. Circuit Court for the Eastern District of Michigan was confronted with a similar situation. In that case one Henry Turner, between 1873 and '77 acquired title to property real and personal of a value of $50,000.00. Between the 13th day of March and the 13th day of December, 1877, he conveyed by several instruments, all of his property to his wife, reciting an aggregate consideration of $58,365.00. In the following year he filed a petition in bankruptcy, and in due course the plaintiff in the case, Tarsney, was appointed assignee of his estate. His assets being insufficient to pay the debts, a bill was filed by the assignee for the purpose of having the conveyances to his wife annuled on the ground that they were executed without consideration and with intent to hinder, delay and defraud creditors. There was no positive evidence of any actual fraudulent intent in the execution of the conveyances and on the ground of insufficiency of proof the bill was dismissed.

In the course of its opinion the court said:

> "There is no positive evidence of an actual fraudulent intent in the execution of these con-

> veyances or either of them, but it is insisted that they are badges from which the fraudulent intent ought to be inferred. A badge of fraud is in fact calculated to throw suspicion upon the particular transaction. But badges of fraud are not conclusive, they may be explained. Has such explanation been made in this case? In this regard no proof has been offered, except the evidence of the defendant and her husband. * * * They say the defendant owned a separate property in China which yielded an annual rent of $5,000.00 which by her direction was paid to her husband; that he used this fund to him to pay for the property (or a portion of it), in controversy, and took the title in his own name; that in this way he became her debtor and that he honestly and in good faith made the conveyances assailed by this proceeding in liquidation of his said indebtedness."

The court then pointed out that there was no other evidence in the case showing the fact to be otherwise and therefore held that the complainant was not entitled to a decree on the ground that the conveyances mentioned were made to hinder, delay and defraud creditors.

Tarsney vs. Turner, 48 Fed. 818.

Viewed as a proceeding based on the doctrine of estoppel to subject the property in question to liability for the indebtedness of the First National Bank under the allegations of the petition that credit was extended

by the bank in reliance on the representation of the bankrupt that he was the owner of the property, the petition is wholly insufficient to warrant the granting of equitable relief.

Breeze vs. Brook, 31 Pac. 742;
Murphy vs. Clayton, 45 Pac. 267;
Richmond vs. Blake, 60 Pac. 385;
Brant vs. Virginia Coal Co., 93 U. S. 327;
Trenton Banking Co. vs. Dunton, 86 N. Y. 230.

It is not alleged that reliance was placed on the records, but only on the representations of the bankrupt and under such circumstances no recovery could be allowed according to the authorities above cited.

It is difficult to perceive what principle of law or equity could be invoked to divest the true owner of his title for the benefit of the creditors herein. As heretofore stated they have acquired no liens by judgment, attachment or otherwise and are in no manner brought into privity to the title. They are strangers to the transaction between the bankrupt and the defendant. It may be said that credit was extended by the First National Bank in reliance on the record title, but this is not enough. The recording laws are not for the benefit or protection of creditors, but are established for the protection of purchasers and encumbrancers of real property, dealing directly with the property. There is no low prohibiting a man from carrying his property in the name of another under a parol trust. The recording laws, however,

would protect any purchaser or encumbrancer acquiring title from the apparent owner in reliance on the record title. In such a case the purchaser is brought into privity to the title and by the doctrine of estoppel, the true owner would be estopped from asserting his title. But a mere creditor occupies no such position. There is no privity of relation whatever between the creditor and the true owner. There was no duty owing and no obligation upon the part of the true owner toward the creditor. Having taken no mortgage and having acquired no lien by attachment or otherwise while the title stood in the name of the bankrupt, there is no principle of law or equity upon which the true owner can now be divested of his title.

As said by the Supreme Court of California:

> "There is nothing illegal or against public policy in the mere fact that a party equitably entitled to real property permits the legal title to remain in another. Resulting trusts are fully recognized by our law and everyone is presumed to know the law."
>
> Murphy vs. Clayton, 45 Pac. 266-269.

There being nothing illegal or wrongful in a citizen equitably entitled to real property allowing his property to stand in the name of another, how then can a creditor claim any rights against such a citizen in the absence of any active fraud or misconduct.

In Murphy vs. Clayton, the court says:

"To constitute such an estoppel it must be shown that the person sought to be estopped has made an admission or done an act with the intent of influencing the conduct of another or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up; that the other party has acted upon or been influenced by such conduct or declaration; that the party so influenced would be prejudiced by allowing the truth of the admission to be disproved. Equity does not favor estoppels, and I see no reason why this case should not be determined according to the verity of the fact. Perry, Trusts, Sec. 416."

"In Lord v. Bishop, 101 Ind. 334, where a husband received money from his wife's mother to be invested in lands for the wife, and took title in his own name, and held it 33 years, and then, when in debt, put the title in his wife, having during that time paid the taxes, and by his labor cleared and improved the land, it was held that equity would not subject it to the payment of his debts. The court said: 'Taking the title in his own name made the husband as much her trustee as though he had received the money directly from his wife's hand. It was not for the husband to take to himself the benefaction which the mother intended to bestow upon her daughter, and his creditors can stand in no better attitude than he stood himself. Bank v. Kimble, 75 Ind. 195, Perry, Trusts, Sec. 127. 'That the husband spent his time and labor in clearing and improving the land, and that he

paid the taxes, does not alter the case. The fact remains that it was his wife's land, and he could not improve it away from her.' It is true that in that case the husband took the title in his own name without his wife's knoweldge or consent; but that fact does not seem to have been considered important. The wife had had ample time to ascertain the fact, and to have the legal title transferred to herself."

Murphy vs. Clayton, Supra.

THE RECORDING LAWS.

There is nothing in the recording laws of the State of Idaho indicating a purpose to aid or protect creditors in determining the credit rating of citizens. These laws were enacted with no such end in view, but for the purpose only of protecting bona fide purchasers and encumbrancers in good faith.

Sec. 3149, Idaho Revised Codes provides as follows:

"Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

Sec. 3159, Idaho Revised Codes provides as follows:

"Every conveyance of real property, acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

Sec. 3160, Idaho Revised Codes provides as follows:

> "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded."

None of these provisions of the Idaho Codes indicate a purpose of protecting or safeguarding creditors who have acquired no right, title or lien on the property.

In the chapter following, however, the legislature of Idaho under the title of "Unlawful Transfers" set out to look after the rights and interests of creditors and it provides in this respect as follows:

Sec. 3169:

> "Every transfer of property, or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

This section has no application, for the reason as we have already pointed out, that the conveyances by the bankrupt was merely in performance of a parol trust and there is no proof of actual fraud.

But the Idaho Legislature did not stop here, it has placed on the statute books of the state a law which covers precisely the situation now before the court.

Sec. 3114, Rev. Codes of Idaho, provides as follows:

> "Every grant or conveyance of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or incumbrancer, who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded."

Under this statute it would be necessary for the creditor to establish a lien upon the property prior to the reconveyance to the true owner. A similar statutory provision exists in California and was considered in the case of Murphy vs. Clayton, Supra. For a discussion of the purpose and object of the laws relating to the recording of instruments, See Vol. 2 Jones on Real Property in Conveyancing, Sec. 1368, et seq. It is there clearly pointed out that the object of the recordation laws is to protect the title of purchasers of real property and not to create an agency for assistance of banks or business firms in fixing credit ratings.

The danger of establishing any such rule is manifest in this case. At the time of filing of petition herein and before the hearing, only one creditor, the First National Bank, complained of the transfer now

sought to be avoided, and according to the allegations of the trustee it relied only on the representations of the bankrupt. No reference whatever was made to the record title. At the hearing some witnesses in an indirect way attempted to claim that they relied on the record title. When their testimony is analyzed, however, it will be found that none of them claim directly that they relied on the condition of the records showing the title standing in the name of the bankrupt.

To permit the true owner to be divested of title upon parol proof of this character would have a greater tendency to permit fraud than to prevent it. None of the witnesses testifying at the hearing had the courage to come out plainly and clearly and swear that they relied upon the title as it stood upon the records, but their testimony is clouded by indirect statements and insinuations, and it cannot be said from the testimony of any of these witnesses that they did as a matter of fact actually rely upon the record title to this property standing on the records in the name of the bankrupt. The evidence lacks the clear and convincing force requisite to set the machinery of a court of equity in motion.

We respectfully submit that the conveyance sought to be avoided was not made for the purpose of defrauding, hindering or delaying the creditors herein; that the testimony absolutely fails to show any fraudulent intent or active wrong on the part of defendant; that there is no basis for the application of the equit-

able doctrine of estoppel and that upon all the evidence the decision and decree herein should be reversed and this suit ordered dismissed.

Respectfully submitted,

J. BRUCE KREMER,
JAMES E. MURRAY,
Solicitors for Appellant.

No. 3126

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

APPELLEE'S BRIEF

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustees of the Estate of Alec Murray, Bankrupt,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF CASE.

This suit was brought for the purpose of setting aside a certain conveyance made by the bankrupt, Alec Murray, to James A. Murray.

The property in controversy is known as the "Auditorium Building," situate in the City of Pocatello, Bannock County, State of Idaho. It was acquired by purchase at a Sheriff's Sale by E. L. Chapman and Carrie Chapman, under deed bearing date December 8, 1906, (Trans. page 40) and was subsequently transferred to the Monidah Trust, a corporation of the State of Delaware, under deed bearing date January 5, 1907, and a deed conveying the same property, between the same parties, bearing

date June 1, 1907. Subsequently, by deed dated January 5, 1912, recorded in Book 21 of Deeds, page 550, on June 8th, 1912, the Monidah Trust conveyed the property to Alec Murray. Thereafter Alec Murray under date of June 8, 1912, conveyed a one-half interest to George Winter, and subsequently George Winter reconveyed said one-half interest to Alec Murray, and under date of December 29, 1914, Marion Winter conveyed a one-half interest in said property to Alec Murray. On March 5, 1917, Alec Murray, by deed, conveyed said property to James A. Murray, the appellant defendant, for consideration named, One Dollar, recorded in Book 31 of Deeds at page 462; all of these deeds being of record in the office of the County Clerk and Recorder of Bannock County, State of Idaho, where said property is situate; and all of said deeds and records refer to the said "Auditorium Building," in question herein (Trans. pages 40 and 41). All of said deeds are the common warranty deeds carrying the usual habendum clause(Trans. page 74). The deed dated March 5, 1917, from Alec Murray to James A. Murray was without consideration (Trans. pages 55 and 60). The said "Auditorium Building" has never stood on the records of Bannock County, State of Idaho, in the name of James A. Murray (Trans. page 57). During the time said "Auditorium Building" stood in the name of said Alec Murray, upon the records of Bannock County, State of Idaho, the taxes were assessed to and paid by the said Alec Murray upon said property. (Trans. pages 48 and 49, also 58 and 59). During the same period of time various persons advanced credit to the said Alec Murray in

reliance upon the ownership by the said Alec Murray of the said Auditorium property and the records of Bannock County, State of Idaho, showing said ownership (Trans. pages 42 to 52).

ARGUMENT AND AUTHORITIES.

Appellant herein, in his first specification of error, in our opinion, has set forth the controlling contention and it appears to us that his entire argument, stripped of its verbiage and collateral matter, is confined to the question set forth therein, as to whether a trust was ever made or created, obligating the bankrupt to transfer the property in dispute to the appellant defendant.

If this be the correct theory of appellant's argument, then it seems to us, at the outset, that we are confronted with few salient features set forth by statutes and decisions of the courts.

Section 60, Subdivision "A" of the Bankruptcy Act of 1898 as amended says:

> "PREFERRED CREDITORS.—(a) A person shall be deemed to have given preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudicated, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering

of the transfer, if by law such recording or registering is required.''

Section 70, Subdivision ''E'' of the same act says:

''The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

We take it that under the above Section and subdivisions quoted, the appellant raises only the question as to whether in fact, James A. Murray, appellant defendant, made a parol trust agreement touching the Auditorium property and if that question be answered in the negative, then appellant must fail, having conceded all other questions. In approaching this question, it should be remembered that the title to the property involved never vested in James A. Murray and also that Alec Murray, Bankrupt, while the record owner of the property, dealt with it as his own individual property and procured credit thereon upon the faith and representations of such ownership; that is to say, James A. Murray, well knowing the facts concerning the record title of the property and of the conduct of Alec Murray in handling such property, voluntarily permitted said Alec Murray to hold out to the world that he was the absolute

owner of the property and procure credit indiscriminately, using such property as a basis for such credit (Trans. pages 42 to 52, also pages 58 and 59).

It is to be remembered by the court in considering the conduct of the appellant defendant, as to a parol trust agreement, that at no time, so far as the record discloses, was there ever any writing effecting such a trust relationship (Trans. page 58). In this regard, having in mind that the deeds through which title to the property herein in dispute is deraigned are the usual warranty deeds, in each instance, with the usual conveyances running to the grantee, and the usual habendum clause, we quote Section 3112 of the Revised Codes of the State of Idaho, which reads as follows:

> "A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended."

In the face of these record deeds, the appellant defendant attempts to make out a parol trust agreement entered into at the time the Monidah Trust, a corporation, under date of June 5, 1912, conveyed the property to Alec Murray, Bankrupt (Trans. page 54), and we might add here that the persistent attempts of the appellant to make James A. Murray and the Monidah Trust, a corporation, one and the same person, cannot be acquiesced in by us. We insist that James A. Murray of Butte, Montana, is one person and the Monidah Trust, a corporation of the State of Delaware, is in law a separate and distinct entity. We assume this is elementary

and needs no discussion. Objection was made by counsel at the time this parol agreement was endeavored to be established during the trial, and we take it that the court in its Findings of Fact adverse to the appellant defendant, sustained the objection of the counsel (Trans. page 54), based upon the Statute of Frauds found in the Revised Codes of the State of Idaho in Section 6007, which reads:

> "No estate of interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing."

This section has been construed repeatedly by the Supreme Court of the State of Idaho, to the effect that some writing is necessary to establish the contract relationship between the parties.

In Thompson vs. Burns, 15 Idaho, 572, wherein authorities are reviewed, the court after quoting Section 6007, says:

> "The rule established by that statute, the Legislature considered necessary for the security of property and titles and it has become a well established rule, both in this country and in England."

See also Coughanour vs. Grayson, 19 Idaho, 255.
McReynolds vs. Harrigfeld, 26 Idaho, 26.
Allen vs. Kitchen, 16 Idaho, 133.

McGinness vs. Stanfield, 6 Idaho, 372, at page 372, after quoting Section 6007, holds:

"Under the statutes we are unable to hold that title to real estate or an interest in real estate can be established by proof of a verbal transfer."

And in the syllabus by the court:

"Under the statutes of Idaho a verbal contract for the sale or transfer of real estate is not admissible in evidence against a stranger to such contract."

Turner vs. Gumbert, 19 Idaho, 339, holds:

"Declarations made by a grantor prior to the execution of a deed and inconsistent with the execution of such deed, are not admissible in evidence."

If further authority is needed to support our contention, we cite the case of Smith vs. Mason,55 Pac., 143, in which case the California Supreme Court, passing upon a section of the California code from which Section 6007 of the Idaho Codes was copied, at page 143 said:

"Plaintiff offered evidence of declarations of Daniel Hoover, uttered orally regarding his purpose in executing said deed, and of oral admissions of defendant relative to her title in the land. Such evi-

> dence was rightly rejected by the court. Our statute of frauds forbids an express trust in lands to be created or declared otherwise than by a written instrument.''

after which quotation a line of authorities is cited.

Section 3169 of the Revised Codes of the State of Idaho provides:

> ''Every transfer of property, or charge thereon and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void as against the creditors, existing or subsequent of such person.''

This section seems to us to be in itself conclusive so far as the statutes of Idaho are concerned, against the transfer by Alec Murray, Bankrupt, to James A. Murray of the property in question.

Johnson vs. Sage, 4 Idaho, 764, holds:

> ''In view of the fact that the alleged sale was in trust for the benefit of the grantor and also for the further fact that it was made for the purpose of hindering other creditors from their demands and of the further fact that the Manager was not authorized to make such sale, and transfer, the attempted sale and transfer of such property was void.''

We fail to understand appellant's cotention to the effect that this statute does not apply (Appellant's Brief

page 40). The statute is plain and under the facts in this case a clear preference was given to James A. Murray, and the other creditors were delayed.

If we should concede that the testimony of appellant defendant to establish a trust was admissible, let us pause a moment to see what that testimony is. (Trans. page 55). The question appears, upon examination of appellant defendant:

> Q. At the time you conveyed it to him, did you have an understanding that he was to reconvey it to you or to anyone else you might designate?
>
> A. No, no agreement.
>
> Q. You had an oral agreement, did you not?
>
> A. Yes, sir; I didn't think we needed anything more.

At page 58 of the transcript appears the following:

> Q. The agreement between the Monidah Trust Company and Mr. Murray was not in writing?
>
> A. No writing between us.
>
> Q. No writing between you and Mr. Murray?
>
> A. No, sir.
>
> Q. You said no distinct agreement but just a general understanding?
>
> A. Yes, sir.
>
> Q. You placed the property in his name and allowed it to stand, with the understanding that when you wanted it you could get it back.
>
> A. Yes, sir.

At page 62 of the transcript, the witness James E. Murray testified that there was an understanding that Alec was to deed it back to Mr. Murray or anyone he might name and that "as stated by Mr. James A. Murray he was to hold the property for him and reconvey it to him or to anyone whom he might name."

At pages 64 and 65 of the transcript appears the following testimony in the cross examination of Mr. James E. Murray:

> Q. Were you present at the time a trust was created between Alec Murray and James A. Murray?
>
> A. I was present.
>
> Q. Can you give the conversation?
>
> A. Nothing more than that Mr. Murray said he would convey the property to him and it should stand in his name but at any time he wanted the property reconveyed, he would expect him to do so.

That, so far as the record discloses, we believe, is the only testimony concerning the parol trust agreement and we cannot better comment upon that testimony than by using the words of the learned trial Judge in his memorandum decision, in passing upon this case:—

> "In the instant case the bankrupt was not called as a witness, and it is to be noted that the defendant avoided any direct statement of a trust agreement. After stating that he had "no particular agreement" with the bankrupt at the time the property was conveyed, and that there was nothing said about holding the title in trust, only some general understanding, he was asked by his counsel the question, "At the

> time you conveyed it (the property) to him (the bankrupt), did you have any understanding that he was to convey it to you or to anyone else you might designate,'' to which he replied, ''No, no agreement.'' Then to the extremely leading question, ''You had an oral agreement, did you not?'' he responded, ''Yes, sir. I didn't think we needed anything more.'' And upon cross examination he stated that there was no distinct agreement, just a general understanding. He doesn't testify as to what, if anything, he said, or what, if anything, the bankrupt said, nor does he explain how or why he got such a ''general understanding,'' or attempt to give any reason for having the transfer made by the Monidah Trust Company which he had apparently organized for the very purpose of holding the title to such property.''

Reverting again to our suggestion that James A. Murray of Butte, Mont., and the Monidah Trust, a corporation of the State of Delaware, are distinct persons in law, we are impelled to ask the question, ''Why did this corporation show such unusual interest in Alec Murray?'' In answer to this question, we may find something of interest in the case handed down by the Idaho Supreme Court in the case of the City of Pocatello, a municipal corporation, vs. James A. Murray, doing business as the Pocatello Water Company, 23 Idaho 447, which case was referred to by counsel for the appellee in examination of James A. Murray (Trans. page 57), wherein the witness said, ''I had considerable litigation against the City of Pocatello and at one time the City of Pocatello acquired quite a large judgment against me in the State Court, but I am not aware of the proceedings had in that case. At that time the record title stood in Mr. Winter for one-half

interest and Mr. Alec Murray for one-half interest. That arrangement was in accordance with my order and the proceedings had in that case were under my order. Whatever was done in that case by Alec Murray was under my order and under my direction.''

We are disposed to believe this testimony of Mr. Murray and further believe that the reason the property conveyed by the Monidah Trust, a corporation, formed apparently by Mr. James A. Murray to enable him to more advantageously handle his business, was made in good faith as a gift to enable Mr. Alec Murray and Mr. George Winter to qualify as tax-payers in said case of the City of Pocatello vs. Murray. In that case at page 453 the court says:

> ''An affidavit was also filed on behalf of the defendant by Alex Murray, in which he says that he is the owner of property in Pocatello subject to taxation and which was taxed therein, and that such property is an undivided one-half interest in the real property situated in said City of Pocatello known as the Auditorium, which property appears upon the assessment roll of said city and county for the year 1912 in the name of Monidah Trust, a corporation, and that since the 5th day of June, 1912, affiant has owned in fee simple the title to a one-half undivided interest in said property, and the other one-half interest in said property has ever since the 8th day of June, to the knowledge of affiant, been owned in fee simple by George Winter, co-commissioner of affiant, and superintendent of the Pocatello Water Company, and agent and representative of James A. Murray; that said property was regularly and duly assessed in said city and county by the assessor thereof for the year

> 1912 at $25,798, the total tax for said year being $830.68, one-half of which said tax, $415.34 was paid to the tax collector of said Bannock County within the time allowed therefor and prior to the same becoming delinquent for the said year 1912; that one-half of said sum so paid was paid by, for and on behalf of said George Winter; that the affiant was appointed a commissioner and notice of such selection was served on the Mayor of the city and a receipt of such notice was acknowledged by the mayor, and on the 28th day of January, 1913, affiant received from the commissioners appointed by the city the same notice as is set out in the affidavit of Winter, and in pursuance of such notice he attended the meeting and participated in the proceedings."

It is to be remembered that Mr. James A. Murray according to his above-given testimony had considerable financial interest at stake at that time and every reason of his interest, as well as law, demanded that Mr. Alec Murray and Mr. George Winter own some real estate in the State of Idaho. Certainly it must be that if the position of the appellant defendant taken in said case is true, then the representations and contentions made by him in the present case, to the effect that the property in question was held in trust, is not true. We further believe that the comment of the court in said case still holds true: (23 Idaho, 458)

> "It is also alleged in the answer, and the facts so alleged are clearly supported by the evidence, that George Winter and Alex Murray were joint owners of the property in the City of Pocatello, Bannock County, Idaho, each owning a one-half interest, to the value of $25,000.00 and that such property was

acquired by deed conveying a fee simple title executed upon the 8th day of June, 1912, and that such property was regularly and duly assessed in said city and county by the assessor thereof for the year 1912 at $25,798, the total tax for said year being $830.68 and that one-half of said tax, $415.34, was paid to the tax collector of Bannock county within the time allowed therefor and prior to the same becoming delinquent for said year, and that one-half of said sum so paid, was paid by and for and on behalf of George Winter, and the other half paid by Murray upon the one-half interest he owned in said property.

If this be true, Winter and Murray were joint owners of said property and the title was taken in the name of Murray and the property was assessed to Murray and each of the joint owners paid his proportionate share of the taxes assessed and paid upon said property. From these facts it necessarily follows that each of said parties was a tax-payer within the meaning of the statute in controversy in this case. A tax-payer is one who owns property within the municipality, and who pays a tax or is subject to and liable for a tax. The qualification, however, would not apply to a person who actually owns property and who wilfully and purposely covers up his ownership and conceals his title for the purpose of avoiding the payment of taxes.''

It seems strange to us that the appellant defendant can, with good conscience, press his contention in this case in the face of his former position and we cannot believe that a court of equity will permit him to adapt his position to suit the circumstances of any particular case wherein the same property is involved. In the case above cited at page 460 the court said: ''We conclude therefore, and hold in this case that the record clearly shows that George Winter and Alec Murray were tax-payers at the time

they were appointed as such by the defendant and continued to be so up to the time this proceeding was commenced.

While as we have indicated above, the appellant defendant relies upon the express parol trust agreement, out of an abundance of caution we wish to call to the court's attention a few cases touching upon the question of resulting trust as an attempt may be made to invoke the principles in this case—that is to say, since Section 3112 of the Revised Codes of the State of Idaho abrogated the common law rule of equity as to resulting trusts in the absence or failure of consideration, express or implied, we take it that as fraud or mistake is not suggested by appellant defendant, no resulting trust, in favor of James A. Murray can be held under the deed of June 5, 1912 made by the Monidah Trust to Alec Murray, for in the deed referred to, the conveyance is absolute in form and the habendum clause declares the use and benefit or interest of the property to be in the grantee and this cannot be affected by an oral contrary declaration by the grantor at the time of the conveyance.

Gaylord vs. Gaylord, 150 N. Car. 22;
Verzier vs. Convard, 71 Conn. 1;
McDonald vs. Stow, 109 Ill. 40;
Gould vs. Lynde, 114 Mass. 366.

Farrington vs. Barr, 36 N. H. 86, holds in point that if the deed states a good consideration there is no resulting use or trust in favor of the grantor, although in fact the deed be without consideration.

Donlin vs. Bradley, 119 Ill. 412, holds that where the habendum clause provides the grantee shall hold the premises, etc., to the only proper use, etc., the grantees, their heirs, etc., the benefit, interest is expressly limited to the grantee and no resulting trust in favor of the grantor can be had.

Coffee vs. Sullivan, a New Jersey equity case, 45 Atl. 520, holds that a trust cannot be implied in favor of the grantor of land, the deed operating under the statute of use, the habendum clause declaring the use to be for the grantee, an express trust not manifest in writing made by a grantee of a deed of conveyance of lands in favor of the grantor, is void under the statute of frauds.

The Supreme Court of Iowa, in the case of Acker vs. Priest, 61 N. W. 235, in holding to the same effect, has the following to say:

> "Mr. Pomeroy, in his excellent work on Equity Jurisprudence (section 103), says: "All true resulting trusts may be reduced to two general types : (1) Where there is a gift to A., but the intention appears from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest, or only a part of it. In order that a case of this kind may arise, there must be a true gift, so far as the immediate transferee, A., is concerned; the instrument must not even state a consideration, and no valid, complete trust must be declared in favor of A., or of any other person, * * * . If the conveyance be by deed, the trust will result to the grantor. * * * The deed in the case at bar both recites a consideration and declares a beneficial use in favor of the grantee, and it is ap-

parent that no resulting trust of the first class arose in favor of Mrs. Priest.''

Again the claim of the *cestui que trust* will not prevail as against a creditor who was misled or defrauded by reason of the trust being kept a secret one by some voluntary act of the *cestui que trust,* especially where efforts were made by the creditors to ascertain the true relations,

Campbell vs. Campbell, 79 Ky. 395,

and further there can be no constructive trust in this case for the reason that no fraud is alleged on the part of Alec Murray at the time the deed was given by the Monidah Trust to him.

Judge Frank Irvine, in his article on Trusts, 39 Cyc. 179, says: ''Where there is no relation of trust or confidence between contracting parties other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance, no trust arises by virtue of a verbal agreement in respect to the purchase of lands and a subsequent refusal to execute it, or a denial of its existence, if there is no fraud, undue influence or other wrongful acts, etc.''

We wish to point out specifically that this is not a case where A., being in possession of funds of B., purchases lands and subsequently attempts to exercise fee simple rights as against B.

Motherwell vs. Taylor, 2 Idaho 254, in the syllabus by the court says: ''A resulting trust is raised only when there is fraud in the acquisition of title or where the

money of one is used to pay for real property, the title to which is taken in the name of another at the time said title is taken, and neither a promise to pay nor after payment will give rise to such a trust."

In the case of Lewis vs. Lewis, 3 Ida. 645, the court in its opinion adopts the following language from the case of Olcott vs. Bynum, 17 Wall. 44, wherein the court said:

> "Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after advances or funds subsequently furnished."

We dismiss appellant's contention with respect to the recording laws of the State of Idaho with the statement that the sections cited are for the purpose of protecting purchasers and mortgagees.

With respect to appellant's argument concerning the divesting of property held for creditors under the doctrine of estoppel, we do not deem this matter in point, for the reason that Alec Murray, at all times in question, was the holder and owner of the fee simple title to the Auditorium property. We are not endeavoring in this case to enforce specific liens as appellant seemingly contends, but are asserting our right, as we conceive it, under the Bankruptcy acts of Congress. As heretofore cited in section 70 "E", "unless the appellant is a *bona fide* holder for value prior to the date of adjudication, the property may be recovered or its value collected."

We cannot better state our surmise with respect to the transfer of the Auditorium property by the Monidah

Trust to Alec Murray than by employing the words of the learned trial Judge in his memorandum decision (Trans. page 32) :—

> "I am convinced that he (James A. Murray) intended that the bankrupt should take absolute title to the property so completely that both he and the bankrupt could, without committing perjury, take oath that it belonged to the latter. He hoped and may have even expected that ultimately the bankrupt would reconvey it to him in consideration of the large interests which he had at stake. He may very well have been willing to take the chance which when he considered the relation—both of kinship and of employment, he probably thought was not great; but it still remains true that he gave the property to the bankrupt without any reservations, conditions or qualifications. It is immaterial that he hoped to get the property back. The giving of a gift with the hope that the donee will some time return it or its value, does not operate to create a trust or charge the donee with a trusteeship. For his own purpose the defendant was under the necessity of making an absolute transfer. To have put the property in trust would have been futile."

To recapitulate, our position is that the appellant defendant is not permitted to show a parol trust agreement involving the property in question at the time conveyance was made by the Monidah Trust to Alec Murray, bankrupt, and secondly that no resulting or constructive trust is established in favor of James A. Murray, for the reason that the testimony given, in its most favorable light, fails to show anything beyond a mere hope expressed in the words "general understanding." Both under the statute

of frauds and forbidden transfers in the State of Idaho, such a transaction as the appellant defendant seeks to enforce is prohibited, and we insist that in this case the Monidah Trust, a corporation of Delaware, through the power and influence of James A. Murray, in fact made a gift of the property in question to Alec Murray, and that the purported defense of a parol trust agreement is fraudulent and fictitious, as against the *bona fide* creditors of the insolvent estate, there being no trust of record or none in fact, known to the world or creditors of the estate. Any secret relations or equities existing between James A. Murray and Alec Murray, unknown to the world or the creditors of the insolvent estate, cannot be held, in our opinion, to override the *bona fide* claims of indebtedness, against the estate of the bankrupt. Under the statutes of the State of Idaho no secret equities can prevail against a record title, the common law rule having been abrogated and we canot see how in good conscience the Court can hold otherwise than as stated by the learned trial Judge:

"If it be said that a moral consideration is to be found in the fact that the bankrupt paid nothing for the property, and may have always intended to re-deed it to the defendant, the reply is that to convert such a moral consideration into a legal one would be to transform a transaction of doubtful propriety into an odious fraud." (Trans. page 34).

Respectfully submitted,

J. M. Stevens,

Solicitor for Appellee.

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No._____

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

ADDITIONAL AND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

Appearances for Appellant:

JAMES E. MURRAY,
J. BRUCE KREMER,
L. P. SANDERS,
ALF C. KREMER, of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS, of Pocatello, Idaho.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JAMES A. MURRAY,

Appellant,

vs

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

ADDITIONAL AND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF IDAHO

ARGUMENT.

With the permission of the court we submit the following in addition to and supplemental of the brief heretofore filed for and on behalf of appellant and so far as may be possible shall endeavor to avoid repetition of matters therein contained.

This action is one to set aside a deed of convey-

ance upon the ground of fraud. It was executed by Alec Murray within the period of four months before the filing of the petition for adjudication in bankruptcy and delivered to appellant and placed on record, and the gist and essence of the petition is that it was so executed and delivered "with the intent to hinder, delay and defraud the creditors of the said Alec Murray, bankrupt." (Paragraph VIII of the petition, page 10.)

The provision of the federal act of bankruptcy under which the action proceeds, is Section 67 (e), which is as follows:

> "e. That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made, or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the credit-

> ors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee (trustee) and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

It is not a proceeding wherein a trustee seeks to have a transfer adjudged to be a preference and the distinction between these two kinds of action is clearly pointed out in the case of Van Iderstine v. National Discount Bank, 174 Fed. 518, wherein it is said:

> "A 'preference' and a 'fraudulent transfer' of a bankrupt's estate within the bankruptcy act are not the same. In a preferential transfer the fraud is technical and consisting in the infraction of the rule of equal distribution among all creditors, which it is the policy of the court to enforce when all cannot be fully paid; while in a fraudulent transfer the fraud is actual, in that the bankrupt has secured an advantage for himself out of what, in law, should belong to his creditors."

This case on appeal to the Supreme Court of the United States was affirmed, 227 U. S. 575, 57 Law Edition, 652; the decision in effect holding that the payment by a bankrupt within the four months' period of a legitimate debt is not within the judicial condemnation of the provisions of Section 67 (e) of the federal act of bankruptcy.

With respect to the well recognized distinction between technical fraud and actual fraud as pointed out in the foregoing decision, we shall hereafter deal more elaborately when we present to the court the rule unanimously adopted by the federal courts as to the character of proof demanded of a trustee in bankruptcy in a proceeding to set aside a transfer for fraud under the provisions of the bankruptcy act.

No matter how gross the fraudulent intent or conduct of the grantor, bankrupt, it is the law that the grantee may not be deprived of his property by such reprehensible acts on the part of the bankrupt.

It is held to be sufficient for the grantee to show good faith, i. e., good faith with respect to any rights of the creditors, but no one else, and in cases where the title to the property was confessedly in the grantor who sold or conveyed it, a present fair consideration. But what constitutes such consideration varies with the facts and circumstances of the particular case. Where the property admittedly belongs to the debtor adjudged a bankrupt, then the present fair consideration under the decisions must be that which the term implies and which is a matter of proof—such consideration being something of value constituting a

present fair one. But in a case, like the one at bar, where the owner—the appellant herein—owning the property, transferred it to the grantee—the bankrupt herein—for trust purposes and upon the termination of the trust re-invested himself with that which equitably at all times was his own, the present fair consideration does not require payment by the equitable owner of any substantial or even nominal consideration for the purpose of again procuring the legal title of that which at all times was his own property. Herein the bankrupt accepting the legal title of the trust property without payment therefor and having completed the purposes of the trust could not equitably demand payment to him of a substantial purchase price or a consideration approximately equivalent to the value of the property nor can the trustee or creditors equitably demand that any such showing be made by the appellant in this case. The bankrupt several years prior to the filing of the petition in bankruptcy procured the legal title to the property paying nothing for it as is usual and customary when property is transferred for trust purposes and upon the termination of the trust he transferred to his grantor, the appellant herein, such legal title. Transactions of this kind are usual and do not meet with judicial condemnation. The bankruptcy act does not contemplate that because the trustee has been adjudicated a bankrupt the actual owner must purchase his property for a substantial consideration, nor does the law remotely suggest that the creditors of

the bankrupt trustee under the trust arrangement may equitably or rightfully demand that the equitable owner shall pay "the present fair consideration" for the return of that which was always his own. Hence, herein, the trust agreement having been established, the bankruptcy law does not require that appellant show more than good faith—good faith in so far as the creditors of the bankrupt are concerned and nobody else.

Under the decisions, and first of all, the trustee herein must show the actual fraud of the bankrupt.

> "The act does not dispense with the necessity of showing to avoid a conveyance or transfer under Section 67 (e), that the bankrupt had the *actual intent* to hinder, delay or defraud creditors. What is meant when it is required that such conveyance, in order to be set aside, shall be made with the intent on the bankrupt's part to hinder, delay or defraud creditors? This form of expression is familiar with the law of fraudulent conveyances and was used as the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate, a conveyance if there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration if made for the purpose of hindering, delaying or defrauding creditors. The question of fraud depends upon the motive. Kerr, Fraud and Mistake, 196-201. The mere fact that one creditor was preferred over another or that the conveyance might have the effect to secure one creditor and deprive others

of the means of obtaining payment was not sufficient to avoid a conveyance; but it was uniformly recognized that acting in good faith a debtor might thus prefer one or more creditors. Stewart v. Dunham, 115 U. S. 61; Huntley v. Kingman Co., 152 U. S. 527. We are of opinion that Congress in enacting Section 67 (e) and using the terms 'to hinder, delay or defraud creditors' intended to adopt them in their well known meaning as being aimed at conveyances intended to defraud. In Section 60 merely preferential transfers are defined and the terms on which they may be set aside are provided; in 67 (e) transfers fraudulent under the well recognized rules of the common law and the statutes of Elizabeth are invalidated. The same terms are used in Section 3, Subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay or defraud creditors. Such transfers have been held to be only those which are 'actually fraudulent.'"

Coder v. Arts, 213 U. S. 223;

Thompson v. Fairbanks, 196 U. S. 516.

Consequently, all that the appellant need show is good faith towards the creditors of the bankrupt only, the peculiar facts in this case disclosing the inception and termination of the trust and hence dispensing with the present fair consideration that, where a sale of property confessedly belonging to the bankrupt is shown to have been transferred, must be established as moving from the vendee or grantee.

Dooken v. Page, 147 Fed. 439;
Shelton v. Price, 174 Fed. 891;
2 Remington on Bankruptcy (2nd Ed.) Sec. 1495.

We have already invited the attention of the court to the facts herein which differ from those involved in the decisions where the property was admitted by all parties not to have been held in trust but to have been the bankrupt's own property which he conveyed away. In such a state of facts the purchaser must show the present fair consideration discussed in the cases. But where, on the contrary, the property was held by the bankrupt as trust property, the legal title thereof having been conveyed to him for the purpose of enabling him to effectuate the trust agreement, without payment of substantial consideration therefor, the present fair consideration referred to in the very nature of things need not be shown by the owner of the equitable title upon conveyance of the legal title to him for such rule would violate every principle of law and justice and impose upon the transferee the burden of buying his own property for a present fair consideration. No such principle or requirement is laid down in the books.

Reverting to the question of what constitutes good faith, it is first of all proper to keep in mind the fact that the transferee need only show good faith in the transaction so far as the creditors of the transferrer, the bankrupt, are concerned. It means that the credit-

or should not act in such a way as to *intentionally defeat the bankruptcy act,* and even though appellant were shown to have knowledge of the bankrupt's insolvency this, without more, is not enough to destroy his good faith.

2 Remington on Bankruptcy (2nd Ed.), Section 1504.

"Lack of good faith must amount to *actual fraud* to evade an avoidance of the transfer."

2 Remington on Bankruptcy (2nd Ed.), Section 1504, page 1391, bottom.

In the case of Powell v. Gate City Bank, 178 Fed. 609, it is said:

"The security given for a present loan is not avoided by the fact that it actually hinders or delays creditors by the withdrawal of the security from application to the payment of their claims unless it was given *with an actual intent to defraud such creditors and the recipient had actual or legal notice of that purpose. Actual fraud in which the recipient of the lien or security participates is indispensible to the avoidance of a transaction of this nature.*"

In the case of Bush v. Export Storage Company, 136 Fed. 918, it is said that:

"It may be affirmed to be true as a general proposition that under any state system of jurisprudence, it is necessary in order to set aside a conveyance or transfer of property as fraudulent

> as against creditors that the fraud must have been participated in by the vendee or purchaser as well as the vendor."
>
> (Page 922.)

Hence in the ultimate analysis of the act and the showing that is demanded of the trustee in bankruptcy in a proceeding of this kind there must be established first, actual fraud on the part of the bankrupt, and, second, actual fraud on the part of the appellant as against the bankrupt's creditors. And we, therefore, contend that the trial court erred in holding that appellant insofar as any creditor of the bankrupt was concerned, was guilty of any fraud whatever. Certainly as to such a creditor it is not shown by the degree of evidence essential in a case of this character that he was guilty either of bad faith or fraud, actual or constructive. He took back that which belonged to him. Having conveyed it for trust purposes without receiving consideration therefor, there was nothing illegal or contrary to good morals that he should receive it back without paying therefor when the purposes of the trust agreement had been performed. None of his acts was one of which any creditor of the bankrupt, nor the trustee in bankruptcy, has a right to complain. It was under the decisions essential to show not only actual fraud on the part of the bankrupt, but likewise actual fraud on the part of appellant as against the trustee in bankruptcy and the creditors.

Assuming, without conceding the fact, that Alec Murray represented that the Idaho property was his own, there is no evidence that he made such representations to the knowledge of appellant and such evidence is inadequate by itself under the law to justify the decree appealed from. As actual fraud of both bankrupt and appellant must be established by evidence clear and satisfactory, in the very nature of things such evidence must show a concert of action between the bankrupt and the appellant, for it is altogether an anomaly and inconceivable that between grantor and grantee or vendor or vendee, each may be guilty of actual fraud and each innocent of what the other was doing. Such a condition is wholly impossible and is inconsistent with all human relations or experience. The record is wholly silent as to any evidence of such a condition or relation existing between the bankrupt and appellant herein. That there must be evidence not only of fraud on the part of the bankrupt within the rule laid down by the decisions, but also on the part of the appellant as against the creditors necessarily must be true from a consideration of the petition itself. The action is brought against James A. Murray, the transferee. It is not an action against Alec Murray. It is alleged against James A. Murray as the defendant that the deed was given to him with the intent to hinder, delay and defraud the creditors of the bankrupt. It would violate every conception of pleading and proof to assert that in an action against A wherein such an allegation is not only

made, but necessary to be set forth and proved, the case is established by evidence in support of such allegation against B. Essentially then there must be evidence against James A. Murray of such allegation, but, as noted, evidence short of actual fraud is insufficient to prove the case against him. Where, in the record, can there be found proof of actual fraud as against the creditors of the bankrupt on the part of the appellant? We confidently assert that there is none.

It is evident that the trial court overlooked and ignored this essential fact that had to be established by clear, convincing and satisfactory evidence.

A study of the decision which is incorporated in the record discloses the fact that the trial court indulged in severe criticism of the conduct of appellant as against the State of Idaho with respect to the qualification of Water Commissioners. We respectfully submit that had appellant's conduct justified the animadversions of the trial court and had he attempted to evade or play fast and loose with the laws of the State of Idaho (a fact we do not admit), still such conduct on his part does not remotely have a bearing on the vital issue here, for it is not a question of good faith on the part of the appellant towards the State of Idaho, its laws or courts, but whether or not his conduct and acts proximately tended "to hinder, delay or defraud the *creditors of the bankrupt.*" We further contend that there is no adequate proof of the apparent finding of the trial court that appellant

presented the property in question to the bankrupt as a gift. Evidence to establish a gift must be clear and satisfactory, and we respectfully submit that the record does not present even a fair inference that appellant intended to make a present of the auditorium to the bankrupt. That evidence sufficient to establish a gift must be clear and satisfactory, see 20 Cyc. page 1246 (4) and cases. The acts of the parties themselves are inconsistent with such a theory, and so far as the rights of appellant are concerned it is not to be adjudged a gift simply because the record discloses testimony to the effect that the bankrupt asserted that the property was his, for that the appellant had any knowledge of such claim the record is silent. That the appellant transferred the auditorium to Alec Murray with the intent alleged and essential to be proved by clear and convincing and satisfactory evidence we submit that there is no proof in the record; not a scintilla of proof that the transaction ever remotely had for its purpose the defrauding of the creditors of Alec Murray and without proof of this fact the decree cannot stand. Even were it the fact that appellant transferred the property to qualify commissioners under the statutes of Idaho relative to municipal water service which the lower court apparently conceived to have been his purpose, still such fact, were it a fact, does not remotely tend to prove the vital issue here. That appellant owning the property in question, transferred the legal title to Alec Murray without consideration, for trust purposes—whether reprehensible

or otherwise, under the laws of Idaho is immaterial in an action brought by the trustee in bankruptcy upon behalf of creditors, asserting that the transaction was consummated with the intent of hindering and delaying the creditors of the bankrupt. That the equitable title was at all times in appellant, who was the actual owner thereof and that Alec Murray was a mere trustee, and that at all times so actually owning the property, it was deeded to appellant, are facts uncontroverted and uncontradicted in the record.

As pointed out in an action of this character to set aside a fraudulent conveyance, the rule as to the degree of proof essential is in no way relaxed in a bankruptcy proceeding brought by a trustee. Clear and satisfactory proof of the actual fraud as distinguished from technical or constructive fraud is necessary, and we submit that the record fails to present the adequate degree of proof required.

> "Fraud is never presumed but must be proved by clear and satisfactory evidence and will not be imputed when the facts from which it is supposed to arise are consistent with honest intentions."

Allen v. Riddell, 37 So. 680;

Eckstaedt v. Moses, 105 Ill. App. 634;

American Varnish Co. v. Reed, 87 N. E. 224;

Shumaker v. Davidson, 87 N. W. 441;

Gray v. Tollwell, 41 Atl. 869.

"Fraud is not to be lightly imputed. The law never presumes it. It devolves on him who alleges fraud to show the same by satisfactory proof."

Jones v. Simpson, 116 U. S. 609; 29 Law Ed. 742;

Jacobs v. Van Sickel, 123 Fed. 340.

"If the fraud is not strictly and clearly proved as alleged, relief cannot be obtained."

Mielshier v. McKinley, 35 S. E. 446.

The Supreme Court of the United States in the case of Coder v. Arts, 213 U. S. 223, *supra,* points out the distinction between technical or constructive fraud and actual fraud, and it is the purport of the decisions that in an action to set aside fraudulent conveyances, actual intent to defraud and actual fraud on the part of the vendor or grantor is not sufficient, there must further be evidence of actual fraud on the part of the vendee.

"Actual fraud implies deceit, artifice, trick, and design."

People v. Kelly, 35 Barb. 444.

"'Actual fraud' is a deception practiced in order to induce another to part with property or to surrender some legal title and which accomplishes the end designated."

Haas v. Sternbach, 41 N. E. 51.

Actual fraud is any cunning deception or artifice used to circumvent, cheat or defeat another.

Hatch v. Barrett, 8 Pac. 129.

> "Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived. Constructive fraud consists in any act or omission or commission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. The former implies moral guilt; the latter may be consistent with innocence."
>
> Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

> "One who knowingly and wilfully makes full representations as to material facts with intention to induce the other to enter into a contract with him and who does so induce the other to enter into the contract to his injury, is guilty of actual fraud as regard to his intent as to injury to the other party. It is a fraud in law if the party makes representations which he knows to be false and injury ensues, although the motive from which the representations proceeded may not have been bad."
>
> Northwestern Life Ins. Co. v. Montgomery, 43 S. E. 79, 80.

Under the provisions of the act of bankruptcy the federal decisions with complete unanimity hold that

the party seeking to set aside a conveyance given "to hinder, delay or defraud creditors" must prove this actual fraud—actual intent so to defraud as distinguished from technical or constructive fraud, and as held in the case of Bush v. Export Storage Co., 136 Fed. 918, it must be shown that this actual fraud was participated in by the vendee or purchaser as well as the vendor.

In re Maher, 144 Fed. 503, the court observes that "in a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual, etc." and as pointed out such rule has been adopted by the Supreme Court of the United States.

The following cases demonstrate that the intent to hinder, delay or defraud must be actual not presumed as a consequence of acts.

Re Eggart, 132 Fed. 735;
Lansing Boiler & Engine Works v. Ryerson, 128 Fed. 701;
Githens v. Schiffer, 112 Fed. 505;
Hark v. Allen Co., 146 Fed. 665;
Re Virginia, etc. 139 Fed. 209;
In re Bloch, 142 Fed. 674;
Davis v. Schwartz, 155 U. S. 631; 39 Law Ed. 289.

"A transfer by an insolvent within four months prior to the filing of the petition in bankruptcy

proceedings for the purpose of securing or paying a pre-existing debt without any intent to effect other creditors injuriously beyond the necessary effect of the security is lawful and does not evidence any intent to hinder, delay or defraud creditors within bankruptcy act, July 1, 1898, etc., providing that all transfers or incumbrances by a bankrupt within four months prior to the filing of a petition with the intent to hinder, delay or defraud creditors shall be void as against creditors except as to purchasers in good faith."

In re Armstrong, 145 Fed. 202;
Coder v. Arts, 152 Fed. 942; 213 U. S. 223;
53 Law Ed. 772, *supra.*

"To avoid a mortgage under Section 67 (e) as to other creditors, actual fraud in which Quinn (mortgagee) participated as distinguished from a mere preferential transfer or constructive fraud must be shown."

McAtee v. Slade, 185 Fed. 442, 451.

"It is not every intent to hinder or delay creditors . . . . . but an intent to do so unlawfully only that is denounced by that section (67 e)."

Sargent v. Blake, 160 Fed. 57.

"To avoid this transfer under section 67 (e) of the bankruptcy act it is incumbent upon complainant to show actual fraud in fact in the conveyance of the property to the deceased as distinguished from constructive fraud. Citing cases."

Meservey v. Roby, 198 Fed. 844-848.

Herein we inquire where is proof of actual fraud or actual intent to hinder or delay creditors as required under the decisions to be established by clear, convincing and satisfactory evidence?

That the appellant, or more correctly as the record discloses, the Monidah Trust Company, conveyed the property to Alec Murray in 1912 is a conceded fact. There is no dispute that it was transferred to the bankrupt under a trust arrangement. On March 5th, 1917, Alec Murray deeded it back to appellant and the deed was placed on record. There was no concealment of such transfer. That appellant did not pay a substantial consideration for such deed is of no probative force for it is also true that under the trust arrangement Alec Murray paid nothing for the property, consistent with the understanding that that which was the subject of the trust during these years was, when the trust terminated, to be returned without consideration. It would be a distortion of the purposes of the bankruptcy act to contend that the trustor when the property was reconveyed should pay a "present fair consideration" for his own property. The trial court chides appellant for having done something which in its judgment was with respect to the rights of the State of Idaho "measurably reprehensible." But were such the fact that is something with which the State of Idaho is concerned; it does not remotely prove that the trust arrangement either at its inception or when it terminated was any part of a plan or scheme in which the appellant was a

party, with actual intent to defraud or by actual fraud "to hinder, delay or defraud the creditors of the bankrupt" which is the only issue herein. It was the duty of the bankrupt to reconvey and even had he done so at the request of appellant, such act is not adequate proof of the vital allegation, for he merely surrendered to the rightful owner that which belonged to him. It may be true as intimated by the authorities that the creditors sustained financial injury by reason of the conveyance to appellant which reduced the total amount of assets of the bankrupt to the extent of the value of the property—but this is not sufficient to establish the intent to defraud as defined by the decisions. As against the trustee in bankruptcy and the creditors of the bankrupt estate appellant did nothing that falls within the condemnation of the law and the evidence is insufficient to justify the decree of the lower court. Upon a review of the entire record herein, we confidently assert that it is manifest that the decree heretofore entered in the District Court of the United States, for the District of Idaho, was prejudicial to the rights of appellant and should be reversed.

Respectfully submitted,

J. E. MURRAY,
J. BRUCE KREMER,
L. P. SANDERS,
ALF. C. KREMER,
Counsel for Appellant.

No. 3126

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLEE.

Appearance for Appellant:

J. BRUCE KREMER,
JAMES E. MURRAY,
Of Butte, Montana.

Appearance for Appellee:

J. M. STEVENS,
Of Pocatello, Idaho.

In the United States
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H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

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SUPPLEMENTAL BRIEF OF APPELLEE.

ARGUMENT.

Pursuant to the propositions supplementing appellant's original brief, we wish to state to the Court that in endeavoring to follow appellant through his various arguments, we may have inadvertently caused some confusion of thought. To clarify any obscurity on the part of appellee, we shall concisely state our position and the law governing. Reference has heretofore been made by appellee to Section 60 "a" of the Bankruptcy Act. We believe that section is not controlling in this scase except that the preferential transfer may develop into fraudulent intent, as this case shows the transfer to be within the four months period prior to bankruptcy. Remington

on Bankruptcy, Second Edition, Section 1220. This action was brought by the Trustee in Bankruptcy to set aside a fraudulent conveyance of the Auditorium property made by the bankrupt to the appellant. Sections 67 "e", 70 "a" and "e" and 22, are the sections of the Bankruptcy Act in point and these sections should be read together in considering this case. Collier on Bankruptcy, Eleventh Edition, Page 1124. Under Sections 70 "a" (2), and 47 "a" (2), the trustee no longer "stands in the shoes of the bankrupt" 'but has the power of a creditor "armed with process". Collier on Bankruptcy, Eleventh Edition, page 727; In re Hammond, 188 Fed. 1020. We accept the position taken by the appellant with respect to Section 67 "e" that for the appellee to make out a *prima facie* case, it is only necessary to show fraud in fact upon the part of Alec Murray, Bankrupt, in conveying the property to the appellant and it then becomes the duty of the appellant to accept the burden and establish good faith and a fair consideration.

"In view of the fact that all property fraudulently conveyed passes to the trustee by operation of Section 70 of the Act, it is evident no reason for the adding of this Section 67 "e" could have existed had it not been that by this peculiar provision conveyances, transfers and incumbrances made by the bankrupt within the four months preceding bankruptcy are void, even if made with merely his own intent to hinder, delay and defraud creditors, unless the transferee prove his own good faith and adequate consideration. At common law and under the statutes, except this bankruptcy statute in its Section 67 "e", a

prima facie case for setting aside a transfer as fraudulent is not complete unless proof be made by the creditor of the transferee's participation in the fraudulent intent; and a suit to set aside a fraudulent conveyance, may fail precisely because of this inability to prove affirmatively the transferee's participation in the fraudulent intent.

Remington on Bankruptcy, 2nd Edition, Section 1493.

Ogden vs. Reddish, 200 Fed. 977;
In re Mahland, 184 Fed. 742.

This action comes directly under Section 70 "a" (4) for the trustee is vested with the title of the property and also with the creditors' rights with respect to the property fraudulently transferred, and is specifically affected by Section 67 "e" for the transfer was made within the four months period condemned by said section. Collier on Bankruptcy, Eleventh Edition, pages 1124 and 1062.

Appellant relies upon the purported parol trust agreement between the appellant and Alec Murray, Bankrupt, alleged to have been made at the time the Monidah Trust, a corporation, deeded the property in question to the bankrupt. Inasmuch as the appellant relies upon the parol trust agreement and concedes there was no consideration for the transfer of the property by Alec Murray to James A. Murray, he admittedly fails to establish one of the requirements under Section 67 "e", namely, a present fair consideration, consequently Section 70 "a" and "e" of the Bankruptcy Act becomes applicable for the reason that under appellant's admission he is not a

purchaser in good faith and for a present fair consideration. "Voluntary conveyances by way of a gift to avoid creditors are not limited to four months and do not have to come under Section 67 "e". "They are void under Bankrutcy Act Section 70 "a" (4) being 'property transferred by him in fraud of his creditors', title to which passes to the Trustee by operation of law." Remington on Bankruptcy, Second Edition, Page 1384. However, this case is within the four months' period. Accordingly it follows that the principal question for this Court to determine is whether the Auditorium property was impressed with a trust at the time it came into the hands of the Bankrupt and in this regard the trial court found it was not, but that the property was conveyed as a gift and the evidence shows that the transfer by the bankrupt to the appellant was also a gift (Trans. pages 56, 57, and 58).

The clever argument by appellant in which he ingeniously endeavors to make the evidence conform to the principles of law applicable, proceeds from false premises. Appellant elects in his supplemental brief to bring this proceeding exclusively under said Section 67 "e" and then straightway endeavors to avoid the exception therein "as to purchasers in good faith and for a present fair consideration" by reverting to his central idea of a parol trust agreement. Obviously this cannot be done for immediately the said exception is attempted to be avoided by appellant he brings himself under said Section 70 for the reason this section places the title to all property of the bankrupt in the Trustee, subject to all the equities as

to trusts obtaining against the bankrupt. Collier on Bankruptcy, Eleventh Edition, page 1133, *et seq.* The trouble with appellant is that he assumes the property in question is affected with a trust and endeavors to make this fit an entirely different situation. Under said Section 67 "e" "all conveyances . . . made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on *his* part to hinder, delay or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor except as to purchasers in good faith and for a present fair consideration" and appellant admits he is not a purchaser in good faith and for a present fair consideration. Accordingly it follows that unless appellant establishes the property to be affected with a trust under Section 70, the transfer is null and void.

With respect to appellant's contention as to a trust agreement affecting this property, heretofore discussed in our original brief page 4 *et seq.*, we therein cited the case of the City of Pocatello vs. James A. Murray, 23 Idaho, 447, the appellant herein, and that case renders the title to the property in question *res adjudicata* for under the issues in that case and the finding of the Court, Alec Murray, Bankrupt, held the fee simple title to the Auditorium property, the Court at page 458 saying: "It is also alleged in the answer and the facts so alleged are clearly supported by the evidence that George Winter and Alec Murray were joint owners of property in the City of Pocatello, Bannock County, Idaho, each owning a one-

half interest to the value of $25,000.00, and that such property was acquired by deed conveying a fee simple title, executed upon the 8th day of June, 1912." We respectfully ask the Court to read this case and to consider in connection therewith the testimony of James A. Murray (Trans. P. 57) where the appellant in testifying said: "This Auditorium property has never stood on the records of this county in my name. Not in the name of James Murray. I had considerable litigation against the City of Pocatello, and at one time the City of Pocatello acquired quite a large judgment against me in the State court, but I am not aware of the proceedings had in that case. At that time the record stood in the name of Mr. Winter for one-half interest, and Mr. Alec Murray for one-half interest. That arrangement was in accordance with my order and the proceedings had in that case were under my order. Whatever was done in that case by Alec Murray was under by order and under my direction. And whatever was done in that case by Mr. Winter was under my direction and under my order. Wherever there was money involved. This Mr. Chapman was an agent of mine.

"I was aware of the fact that Alec Murray deeded part of this property to Mr. Winter. I told him to, and it was reconveyed by my order."

Is it small wonder in light of this record that the appellant while on the stand failed to say what the trust agreement was, or to give any conversation concerning it? How could he, without committing perjury, give the terms of any trust agreement? Can anyone think otherwise than

as found by the learned trial Judge that the appellant made a gift of the property in question to the bankrupt?

We pass now to the question of fraud on the part of the bankrupt in transferring the property in question to the appellant (Section 67 "e" of the Bankruptcy Act), and in this regard the evidence shows:

1. Insolvency of the bankrupt both by the adjudication and the admission of the appellant (Trans. P. 59).

2. The relationship of nephew and uncle and the close business relations existing between the bankrupt and the appellant James A. Murray (Trans. pages 46, 47, 54 to 56).

3. The bankrupt held the record fee simple title to the property in question for about five years (Trans. P 40, and 41).

4. The bankrupt obtained promiscuous credit on the record title of the property in question (Trans. pp. 42 to 52).

5. The bankrupt conveyed practically all his property, the Auditorium in question, to appellant while credits procured in reliance upon the record title to the Auditorium property were owing by the bankrupt (Trans. pp. 41 to 52).

Insolvency is not a requisite element under the first clause of Section 67 "e" but is potent in establishing the fraudulent intent. Remington on Bankruptcy, Second Edition, Sections 1496 and 1499½. Holbrook vs. International Trust Company, 107 N. E. 665, (Mass.), Pollock vs. Jones, 124 Fed. 163.

The close relationship of nephew and uncle, combined

with the business relationship of a long period of years, creates a suspicion that the bankrupt gave the property to appellant to defraud his creditors and this suspicion remaining unexplained, may of itself furnish the necessary intent to defraud under Section 67 "e".

In re Johann, Federal Cases, 7331.

Compare Klinger vs. Hyman, 223 Fed. 257; Peterson vs. Mettler, 198 Fed. 938; Fouche vs. Shearer, 172 Fed. 592; Horner and Gaylord Co. vs. Miller and Bennett, 147 Fed. 295; Henkel vs. Seider, 163 Fed. 553. In each of the above cited cases the Court required explanation to show "good faith".

The other "badges" of fraud on the part of the bankrupt shown by the evidence under the bankruptcy act and under principles of equity also constitute fraud. We believe the question of fraud depends upon the motive, Coder vs. Arts, 213 U. S. 223, and that the intent to defraud is the test, Vollmer vs. Plage, 186 Fed. 598.

It is the general rule accepted by Courts that in fraud cases they will consider all of the circumstances surrounding the transaction to see whether collectively the "badges" make up the intent to defraud and this although any particular circumstance in and of itself may be entirely innocent. Johnson vs. Barrett, 237 Fed. 112. Remington on Bankruptcy, 2nd Edition, Section 1496 in its entirety.

What then was the motive in this case prompting the bankrupt to transfer the property to the appellant? In light of the showing of insolvency and of relationship

both of blood and in business, and of the heavy indebtedness of the bankrupt and his transfer of practically all of his assets in this one conveyance to his uncle, can anything be believed but that he intended to favor his uncle and defraud his creditors? While the intent to defraud is the test, that intent must be gathered from the circumstances surrounding the transaction and in the ordinary affairs of life, a person is presumed to intend that which his acts and conduct clearly bespeak. The fact is that by the conveyance by the bankrupt to his uncle, the appellant, the creditors were defrauded, all fine phrasing and learned discussion notwithstanding, and it is also a fact that the appellant herein has received property aggregating not less than $25,000.00 in value, not one cent having been paid therefor. These facts stand out unalterable by argument. Why did the appellant not produce the bankrupt at the trial and have him testify? Alec Murray is an involuntary bankrupt and not available to the Trustee. He is the person who could testify positively as to any matters concerning the trust agreement. Appellant exclaims: "Herein, we inquire, where is proof of actual fraud or actual intent to hinder or delay creditors as required under the decisions to be established by clear, convincing and satisfactory evidence?" Well, we have produced the proofs enumerated above and in turn inquire "Where is the proof of a trust agreement between James A. Murray, the Monidah Trust and Alec Murray, Bankrupt?"

To conclude it strikes us that no clearer case of fraud, under the bankruptcy act, could be established, and that

the appellant has failed to impress the Auditorium property with a trust, express or by operation of law. Upon a careful reading of the record, we do not see how this honorable Court can do otherwise than affirm the learned trial Judge, for to do equity to all parties concerned, the appellant, through his unusual business conduct, cannot be permitted to take advantage of his transactions to the manifest detriment of the creditors of the bankrupt.

Respectfully, submitted,

J. M. Stevens,
Solicitor for Appellee.

No. 3126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

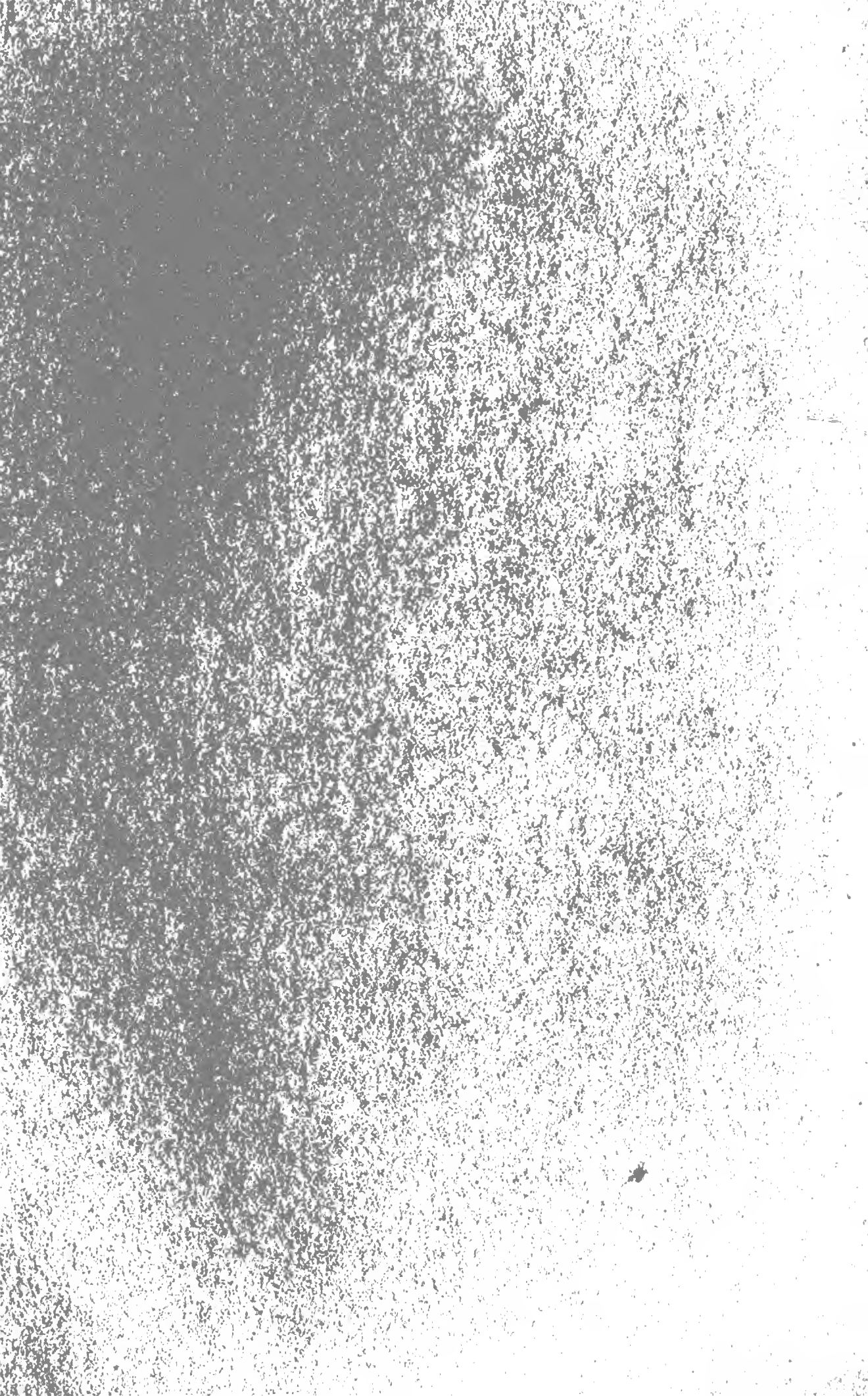
Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

PETITION FOR REHEARING.

J. BRUCE KREMER,
JAMES E. MURRAY,
Solicitors for Appellant.

W. S. K. BROWN,
Holbrook Building, San Francisco,
Solicitor and of Counsel for Petitioner.



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PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the defendant in the above-entitled cause, James A. Murray, and prays that a rehearing be granted in said cause and the decision and opinion of the court recalled because of errors believed to exist therein, upon the grounds and because of the errors hereinafter set out.

The court erred in holding that the conveyance, the subject-matter of this action, was made without consideration and as a gift, and therefore voidable in bankruptcy.

The answer sets up as an affirmative defense that Alec Murray held the property involved, in trust for the appellant. At the trial there was proved, or attempted to be proved, an oral trust, of which the deed in hand was the consummation. That such a trust is valid in law and may be proved seems to have been conceded by this and the court below.

The only evidence with regard to the trust, on either side, is contained in the testimony of the appellant and of James E. Murray, his nephew and attorney (Trans. No. 3126, pp. 54 to 65, and p. 73). This court comments on the feebleness of that part of appellant's testimony, where he stated that he had no particular agreement with the bankrupt at the time the property was originally conveyed, and that there was nothing said about holding the title in trust only some general "understanding" (opinion of Mr. Justice Gilbert, page 3, filed July 1, 1918). The court also referred to Mr. Murray's answer of "Yes, I did not think it needed anything more" in answer to his counsel's leading question, "You " had an oral agreement did you not?"

To support this criticism the court seems to have detached from the corpus of appellant's testimony certain incomplete parts of it, and to have generally disregarded the testimony of James E. Murray, his counsel.

James E. Murray testified (Tr. p. 62): "At the " time it was conveyed to Alec Murray it was with " the understanding as stated by Mr. James A. " Murray, that he was to hold the property for him " and reconvey it to him or to anyone whom he " might name". When we add this to the testimony of appellant and give to the language used its proper weight, we have unqualified evidence, and the only and the whole evidence on the point adduced at the trial, that the conveyance to Alec was made in trust under an agreement to reconvey. Nothing could be clearer or more convincing. What seems to have been the confusing element in this branch of the case was the free use of the word "understanding".

Casually, the term "understanding" appears a loose expression, especially when used with reference to contractual relations; but such is not really the case. Used in such connection, the status of the word has been judicially fixed. The expression is synonomous with "agreement".

Where the word "understood" is used in a deed, in a clause which looks to the benefit of the grantor, the word becomes a synonym of "agreed" (*In re Barkhausen,* 124 N. W. 649, Wis., citing and following *Higginson v. Weld,* Mass., 14 Gray 170, to which latter case we direct the court's especial attention).

An understanding concerning the use of a mule was construed as an agreement in *Holman v. Clark* (41 So. 765, Ala.), and *Mount v. Board, etc.* (80 N.

E. 629, Ind.) and cases therein referred to hold that "understood" and "agreed" are synonymous terms when used with reference to the contractual relations of the parties.

The learned Mr. Justice Paine, in *Kaye v. Crawford* (22 Wis. 320), where an express contract was needed to be shown in order to entitle the plaintiff to recover, made the terms interchangeable by saying:

> The testimony of the plaintiff does not show that the services for which his father gave him the team were rendered in pursuance of any agreement *or understanding* that they were to be paid for. (Italics ours.)

This language was quoted and approved in *Barkow v. Sanger* (3 N. W. 16) where, after quoting Mr. Chief Justice Ryan (Wis.) to the effect that a mutual understanding is the equivalent of an express contract *(Tyler v. Burrington,* 39 Wis. 376-382), it is said (page 22):

> It seems to us that in view of the fact that the learned lexicographer above cited, as well as the justices of this court, have declared the word "understanding", in the connection in which it was used in the question propounded to the jury, as synonymous with "agreement", we would hardly be justified in holding that the jury intended to evade this question by saying there was "no agreement", instead of saying there was "no understanding".

After reviewing the evidence in *Winslow v. Dakota Lumber Company* (20 N. E. 145, Minn.), the court says:

> But we are of opinion nevertheless, that there is evidence in the case fairly tending to show that the goods were furnished to Thompson by plaintiffs upon an understanding between them and defendant that the latter should pay for them. We use the word "understanding" as expressing a valid contract engagement, but one of a somewhat informal character.

In *Bullock v. Johnson* (35 S. E. 705, Ga.) it is held that, when a witness speaking with reference to a contract between himself and another stated there was a certain "understanding", the evidence tends to show that this was what was mutually agreed upon by the parties.

Where a witness is asked whether he had any understanding concerning certain contractual relations in issue, it was held that the word as used called for facts as to the *agreement* between the parties, if any, and that the term was practically synonomous with "agreement" *(Garrett v. Western Union etc., Iowa,* 58 N. W. 1064).

It was held in *Fraser v. Davie* (11 S. C. 56, p. 68), that the word "understood", used by a witness with reference to his own apprehension of an agreement to which he was a party, was used in the sense of "agreement", and *was direct proof of what the agreement was.*

If complaint be made that the appellant testified as to the oral agreement under the lead of his attorney, then we ask the court to remember that it was this same attorney who drafted the original

instrument and who was conversant with the matters attendant upon its delivery (Tr. pp. 61-65), and who very naturally sought to have the exact facts in the record. The whole tenor of appellant's testimony shows a man given over to general expressions—an indulgence which now arises to confront him. Under the circumstances, the leading by his counsel was justifiable, if not necessary.

The court erred in considering as evidentiary matter the opinion in *City of Pocatello v. Murray* (23 Idaho 444) and the affidavits and other matters mentioned in that case, as those matters were not a part of the record herein.

The entire case seems to have pivoted upon the contents of certain instruments mentioned in the report of the case above referred to. It appears from that opinion that one Alec Murray made affidavit of ownership of certain real property situate in Pocatello, known as the "Auditorium", which had been conveyed to him by one James A. Murray; this affidavit seems to have been appended to the answer of James A. Murray, in which he alleged that one Winter and Alec Murray were the joint owners of the Auditorium. Neither this answer nor the affidavit mentioned are in evidence here, nor are any other of the records of that cause. The only mention of the matter to be found in the record here is at page 65 of the Transcript, where Mr. Stephens, the attorney for the appellee, made the following remark:

> Mr. Stephens. In connection with the testimony of James A. Murray, I desire to call the court's attention to the suit of the City of Pocatello vs. James A. Murray, and especially that part of the opinion of the court found upon page 453, touching the affidavits of Alec Murray and James A. Murray, and at the bottom of page 464, relative to the ownership of the Auditorium Theatre in Pocatello.

It is to be noted that the court is not directed even to the volume in which the decision is reported.

Mr. Justice Gilbert, after referring to this decision, says in his opinion (filed herein July 1, 1918):

> The appellant in his answer to the order to show cause alleged that Winter and the bankrupt were residents and taxpayers of the City of Pocatello, and that they were joint owners in fee simple of the property so conveyed, and his answer was accompanied by the affidavit of the bankrupt, in which the latter stated that he owned an undivided one-half interest in the Auditorium property in fee simple, and that he had paid the taxes thereon assessed for the year 1912. A similar affidavit made by Winter accompanied the answer. The court in that proceeding found that the facts so alleged in the answer were "clearly supported by the evidence". * * * Here the appellant and the bankrupt have by answer and affidavit deposed that the conveyance to the bankrupt was a grant of an estate in fee simple, an estate which is the highest known to the law, and which necessarily implies absolute dominion over the land.

Under no rule of law can the matters which the court has thus given such weight be considered as evidence in the case at bar.

Section 5974 of the Idaho Revised Codes states the manner in which a judicial record may be proved:

> Sec. 5974: A judicial record of this State, or of the United States, may be proved by the production of the original or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of another state or territory may be proved by the attestation of the clerk and the seal of the court

annexed, if there be a clerk and seal, together with a certificate of the Chief Judge or presiding Magistrate, that the attestation is in due form.

Section 5977, of the same codes, after enumerating certain matters not pertinent here, provides:

Sec. 5977: Other official documents may be proved as follows:

6. Documents of any other class in this State by the original, or by a copy, certified by the legal keeper thereof.

With regard to the copies of instruments, Section 5982 provides:

Sec. 5982: Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance, that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be a clerk of a court having a seal, under the seal of such court.

Section 5999 prescribes the rule where the document itself is not produced:

Sec. 5999: There can be no evidence of the contents of a writing other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made;

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice;

3. When the original is a record or other document in the custody of a public officer;

4. When the original has been recorded and a certified copy of the record is made evidence by this code or other statutes;

5. When the original consists of numerous accounts or other documents which cannot be examined in court without a great loss of time, and the evidence sought from them is only the general result of the whole;

In the cases mentioned in subdivisions three and four a copy of the original, or of the record, must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

It is plain that the provisions of none of these statutes was complied with in bringing any part of the record in *Pocatello v. Murray* before the trial court. Under Federal enactments that record is removed still further from the eye of the court.

Section 1519 of the compiled statutes (R. S. 905) provides:

1519. (R. S. 905) Authentication of legislative acts and proof of judicial proceedings of State, etc.

The acts of the legislature of any State or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or pre-

> siding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the court of the State from which they are taken.

By the enactment of this section Congress exercised the power conferred upon it by the full faith and credit clause of the Constitution (Const. Art. IV, Sec. I), established a rule of evidence (*Wisconsin v. Pelican Ins. Co. etc.,* 127 U. S. 265, 32 L. Ed. 239), and prescribed the manner in which judicial proceedings shall be proved (*Turnbull v. Payson,* 95 U. S. 418-422, 24 Law. Ed. 437; *Wittemore v. Malcomson,* (C. C., 28 Fed. 605).

In *Pacific R. R. etc. v. Missouri Pacific Ry.* (111 U. S. 505, 4 Sup. Ct. 583, 28 Law. Ed. 498) counsel asked leave to refer to the records of another case reposing in the United States Circuit Court to show the collusive and fraudulent character of certain legal and other proceedings pertinent to and touching the matters litigated in the principal case. The Supreme Court refused cnosideration of these matters, saying:

> There is not, in the record on this appeal, any stipulation that the Ketchum record be considered as a part of the bill, nor is it identified in any way. It is no part of the transcript certified from the Circuit Court. The clerk of that court certifies that what is before us is "A true transcript of the record in case No. 1677, of *Pacific Railroad* (of Missouri), plaintiff, against *Missouri Pacific Railway et*

> *al.,* defendants, as fully as the same remain on file and of record in said case in my office." It follows, that the record in the *Ketchum Case* was never made part of the record in this case so far as appears from the only record which is before this court, on this appeal. In regard to the bill in the Ketchum suit, and the decree, and the master's deed, and the order approving the deed, they are made a part of the bill in this suit, and identified by the annexing of copies. But the statement in the bill that the plaintiff prays liberty to refer to the files and records of the Circuit Court in the Ketchum suit, to show such and such things, can be of no force or effect to allow either party to claim, in this court, the right to produce or refer to anything, as answering the description of such files and records, which it may assert to be such, or as being what the Circuit Court considered as before it. One of the assignments of error, on this appeal, is that the Circuit Court considered matters outside of the record, and matters not embraced in the bill. We are of opinion that this court cannot consider anything which is not contained in the bill, and the exhibits which are annexed to it, and that it cannot look into anything otherwise presented as the files and record of the Ketchum suit, or of any other proceedings in any court, for the purpose of determining the questions arising on the demurrers to this bill.

In re Manderson (51 Fed. 501) the Circuit Court of Appeals of the Third Circuit spoke of the rule as follows:

> Counsel for the Government have requested us to take judicial notice of certain proceedings had in the court below and in the United States Circuit Court for the Eastern District of Pennsylvania for the condemnation of other

> lands than those described in the petition, and which belonged to some of these same respondents; but as those proceedings formed no part of the record, they cannot be allowed to affect the present inquiry.

State courts have held to the rule:

Bank of Montreal v. Taylor, 86 Ill. App. 388;
Gibson v. Buckner, 44 S. W. 1034 (Ark.);
Bond v. White, 24 Kans. 45;
Thayer v. Honeywell, 51 P. 929;
Anderson v. Cecil, 38 Atl. 1074 (Md.);
Allison v. Fidelity, 104 N. W. 753 (Neb.);
Lyon v. Bolling, 14 Ala. 753;
Grace v. Ballou, 56 N. W. 1075 (S. D.).

When we stop to consider that the record of a judgment offered in evidence may be contradicted as to the facts necessary to give the court jurisdiction, both as to subject matter and person (*Wisconsin v. Pelican &c., supra; Grover and Baker Sewing Machine Co. v. Radcliffe,* 11 Sup. Ct. 92-94, 137 U. S. 287, 34 L. Ed. 239; *Thompson v. Whitman,* 18 Wall. 457, 21 L. Ed. 897, a leading case); that the jurisdiction of a state court to render judgment is always open to collateral attack in foreign courts, and in this respect federal and state courts are foreign to each other, though sitting in the same state (*Phoenix Bridge Co. v. Castleberry,* 131 Fed. 175; 65 C. C. A. 481; *Cooper v. Brazelton,* 135 Fed. 476; 68 C. C. A. 188; *Hekking v. Pfaff,* 91 Fed. 60 affirming 82 Fed. 403), and that jurisdictional or other defects might well exist in *Pocatello v. Murray*

so far as this court is informed, we have added and controlling reasons for the support of the rule.

We concede at this point the right of the federal court to look to the statutes and precedents of a state as evidence of the *law* of a state, but this concession does not embrace the right to examine the *facts* involved in such precedents without due proof of their existence.

For fear that this court may lean to the view that it has power to judicially notice the matter set out in *Pocatello v. Murray,* we redirect attention to *Pacific R. R. etc. v. Missouri Pacific Ry.* and *In re Manderson (supra).*

It would therefore appear that the court, as a matter of law being ignorant in the premises, has *assumed* that the Alec Murray mentioned in *Pocatello v. Murray* is the bankrupt here, that the Auditorium there is the Auditorium here, that the James A. Murray there is the Murray here, and that the affidavits mentioned in the opinion were really made and properly filed in a court having jurisdiction and contained the statements credited to them—though, in fact and in law, there is not now before the court proof of any of these things. No doubt the Murrays there are the Murrays here, and that the identity of the property is complete—it would be strange if such were not the case. But this is likewise only an assumption, and cannot supply the lack of evidence. Upon the new trial we are seeking this deficiency may be remedied.

Meantime we are asking that our property be not taken from us by means of presumptions, but that we be permitted to meet the evidence which seeks to take it from us and to explain and rebut it if we can—otherwise, the process by which it is taken cannot be due.

By reason of these manifest errors, and upon the grounds we have set forth, it is respectfully urged that a rehearing be granted herein, that the opinion heretofore filed be withdrawn, and that the judgment herein be reversed.

Dated, San Francisco,
July 29, 1918.

J. Bruce Kremer,
James E. Murray,
Solicitors for Appellant and Petitioner.

W. S. K. Brown,
Solicitor and of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law, and that said petition is not interposed for delay.

W. S. K. Brown,
Of Counsel for Appellant and Petitioner.

No. 3126

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. MURRAY,
Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,
Appellee.

Upon Appeal From the United States District Court for the District of Idaho, Eastern Division.

ANSWER TO PETITION FOR REHEARING.

J. M. STEVENS,
Solicitor for Appellee.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. MURRAY,

Appellant,

vs.

H. E. RAY, as Trustee of the Estate of Alec Murray, Bankrupt,

Appellee.

Upon Appeal From the United States District Court for the District of Idaho, Eastern Division.

ANSWER TO PETITION FOR REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth District:

Comes now the appellee in the above entitled cause, H. E. Ray, Trustee of the Estate of Alec Murray, Bankrupt, by and through his attorney, J. M. Stevens, Esq., and answering appellant's petition for re-hearing, resists the same upon the grounds and for the reasons hereinafter set forth:

The appellant sets forth in order, that the Court erred in holding that the conveyance, the subject matter of this action, was made without consideration and as a gift and under this head cites various cases giving legal defini-

tions of "understanding"; that the Court erred in considering as evidentiary matter the opinion in the case of the City of Pocatello vs. Murray, 23 Idaho 444. We submit that both of the alleged errors were duly considered in the briefs by the respective parties heretofore submitted to the above entitled Court and in the oral argument and in the opinion of the above entitled Court written by Mr. Justice Gilbert.

After a careful reading of appellant's petition for rehearing, we are of the opinion that there is nothing therein contained not heretofore considered and passed upon by the above entitled Court. Appellant lays great stress upon the word "understanding", in answer to which we respectfully submit that the trial Court, in its opinion, passed upon the evidence as a question of fact, while appellant here argues the proposition as a question of law, and the above entitled Court in its opinion has sustained the trial Court in its findings of fact, and affirmed its decision. Manifestly therefore, the evidence, among which appears the testimony using the word "understanding", was passed upon, and as this was a question of fact regarding appellant's contention as to an oral trust, there is nothing new presented to the above entitled Court by the appellant.

Appellant in his second assignment of error devotes considerable space to the discussion of the case of the City of Pocatello vs. Murray, 23 Idaho 444, and insists that it was error for the trial Court to consider this case. In connection therewith, we would like to call the Court's attention to appellant's assignment of errors (Trans.

Pages 77, 78, 79, and 80) and submit that this evidence is not assigned therein as error. Furthermore the appellant has not heretofore, during the entire course of this case, even intimated that it was error for the Court to consider the case of the City of Pocatello vs. Murray, 23 Idaho 444, and made no objections to its admission at the time of the trial, either when it was introduced or subsequently (Trans. P. 65), and, in our opinion it is a rather late hour to complain for the first time of this evidence.

The appellant described the above cited case in his Additional and Supplemental Brief on Behalf of Appellant, at pages 12, 13, 14 and 19; but his argument then was to the effect that said case made no difference in this matter but "is something with which the State of Idaho is concerned", while in his present petition for a rehearing, he is much concerned over the manner of its introduction and not as to its probative value.

In other words, it appears to us that the appellant has abandoned his original position and is simply casting about for some plausible excuse and that at a time long after the proper place or forum in which to make such an objection and we further confidently assert that this matter, having been treated heretofore, both in the briefs and oral argument of appellant and appellee, is not a proper subject for petition for rehearing in this matter, and has been heretofore passed upon by the above entitled Court in its opinion affirming and quoting extensively from the memorandum decision of the trial Court.

We regard it as useless to further present to the Court argument in this matter for the reason that we earnestly

believe appellant in his present petition has offered nothing new to the Court and that a rehashing of the evidence and authorities heretofore cited would be uncalled for. Resting upon the firm conviction that the Court has rightly decided the above entitled case, we respectfully submit that the appellant's petition should be denied.

Dated, Pocatello, Idaho,

August 20th, 1918.

J. M. STEVENS,

Solicitor for Appellee.

No. 3127

United States

Circuit Court of Appeals

For the Ninth Circuit.

FEDERAL MINING & SMELTING COMPANY, a corporation, *Plaintiff in Error,*

vs.

ANGELO DALO, *Defendant in Error.*

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

No.----------

United States

Circuit Court of Appeals

For the Ninth Circuit.

FEDERAL MINING & SMELTING COMPANY, a corporation, *Plaintiff in Error,*

vs.

ANGELO DALO, *Defendant in Error.*

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

FEATHERSTONE & FOX,
Wallace, Idaho,
Attorneys for Plaintiff in Error.
PLUMMER & LAVIN,
Spokane, Washington,
THERRETT TOWLES, ESQ.,
Wallace, Idaho,
Attorneys for Defendant in Error.

In the District Court of the United States, for the District of Idaho, Northern Division, Holding Terms at Coeur d'Alene, Idaho.

No. 691

ANGELO DALO, *Plaintiff,*

vs.

FEDERAL MINING & SMELTING COMPANY, a corportion, *Defendant.*

COMPLAINT

Plaintiff complains and for cause of action against defendant alleges:

1.

That plaintiff is now and was at all times herein mentioned, a resident, citizen, and inhabitant of the State of Idaho.

2.

That defendant is now, and was at all times herein mentioned, a corporation, created, organized, and existing under and by virtue of the laws of the State of Delaware, and during all of the times herein mentioned was engaged in the active operation of a certain mine, known and designated as the "Morning Mine," in Shoshone County, State of Idaho, being one of the silver-lead-zinc mines of the Coeur d'Alene Mining District, and that in and about said mine there are various drifts, tunnels, stopes, shafts and other underground workings.

3.

That at the time of the injury to plaintiff, hereinafter complained of, he was in the employ of defendant, working in said Morning Mine as a "mucker," it being his duty to remove rock, ore, and debris from the different workings and places wherein he was directed to work by defendant.

4.

That on to-wit: January 13, 1917, plaintiff was working for defendant in said Morning Mine, and in the performance of his duties was working near what is known as Number 8 chute, in a stope, west of the main shaft, on the 9th floor of the 1600 foot level, where he had been directed on said day to work by a shift boss of defendant, one John Brown.

5.

That in entering said mine, it was customary and usual for plaintiff and all of the other men doing said work, in said mine, to leave their buckets, containing their lunches, (which lunches they would eat between eleven o'clock and twelve o'clock each day), at the station on the 1600 foot level or sill floor which custom and usage was well known to defendant and was acquiesced in by it.

6.

That on said January 13th, 1917, pursuant to the usual custom and usage hereinbefore mentioned, plaintiff had left his lunch bucket, containing his lunch, at the station on the 1600 foot level or sill floor, and at about the hour of 11:20 A. M., pursuant

to the usual custom and usage, existing in said mine, and which had existed in said mine for some months prior to the time of plaintiff's injury, hereinafter complained of, and which custom and usage was well known to defendant and acquiesced in by it, plaintiff started to go down to the level or sill floor to get his lunch so that he could eat the same at the proper and usual hour within said mine, as permitted by the defendant, and in so doing, it was necessary for plaintiff to pass along and upon the 9th floor to a manway or ladderway, which was situated between chute number 2 and chute number 3; that in passing along and upon said 9th floor, there was no other way to pass excepting over the top of number 7 chute, the space being too narrow on either side of said chute to make it possible to go around the same.

7.

That number 7 chute was an ore chute, being a perpendicular opening about two and one-half (2½) feet wide and about four (4) feet long, the upper end of which opened upon and within the 9th floor of said level, said ore chute extending downward through different floors and levels, the exact distance of which plaintiff is not informed, but believes and therefore alleges the same to be more than one hundred (100) feet in depth.

8.

That said number 7 ore chute was filled with ore so that the top thereof, where it opened out on the

9th floor, by reason of said ore being therein, formed a practically level, continuous floor, upon which plaintiff and numerous other workmen, employees of defendant, working in said mine, walked upon going across and through said 9th floor in the performance of their labor, for about a week prior to the accident to plaintiff, and it was necessary, in order to get across number 7 chute, to walk upon the ore which was piled in said chute, and had said ore dropped or sunk from time to time in said number 7 chute, as the same was removed from below, the same would have been plainly observed by plaintiff and other employees of defendant, performing like services during the week prior to plaintiff's injury.

9.

That during the three or four days prior to plaintiff's injury, the defendant withdrew and removed the ore from number 7 chute, from some point below, and where plaintiff could not observe it, and the ore in the top or upper part or portion of said chute did not sink or lower or drop downward, but for some reason remained in the same stationary condition as it had been for a week prior to the removal of said ore from the lower portions of said chute by defendant, and that plaintiff did not know of said ore being removed from below, or if he did know of it, by reason of the custom existing in said mine, or if he should have known it, he assumed and believed that if said ore was taken out or removed from below, the ore in the upper part of said chute would sink down and therefore he, plaintiff, would be advised of just

what was going on with reference to the action of said ore in said chute number 7.

10.

That on January 13th, 1917, at about the hour of 11:20 A. M., of said day, plaintiff was as aforesaid, walking across the opening of said number 7 chute, upon the ore which was piled therein, in the same manner as he had been doing for numerous days prior thereto, and while going across and upon said ore, on said date, the same suddenly and without warning, dropped down a distance of more than thirty (30) feet, precipitating plaintiff with it, causing the injuries to plaintiff hereinafter complained of.

11.

That defendant knew at all times while taking the ore out from below in said chute that the upper portions thereof were not sinking downwardly to correspond with the removal of said ore below, and defendant knew that the ore was remaining in the top of said chute in the same manner and position as it had remained in for some days prior thereto, and defendant knew that the ore in the upper part of said chute was for some reason being held suspended, and knew that plaintiff did not know, and could not have known of such facts or the danger incident to walking on said ore, and defendant knew that plaintiff and other employees would, during the day, walk upon said ore, while wholly unconscious of said danger and without any opportunity to be advised thereof, and defendant knew of the probability or possi-

bility of said ore dropping or collapsing at any time with plaintiff or any other employee or employees while they were on it or going over it, but notwithstanding said knowledge, defendant negligently and carelessly failed to take any precautions, give any warning or notice, or to do or perform any act to either inform plaintiff of said conditions, or to remove the danger threatened therefrom and incident thereto.

12.

That the condition of said ore chute and the ore therein had been, without plaintiff's knowledge, transferred from a condition of safety to one of danger, owing to the negligence and carelessness of defendant, its agents and servants, as aforesaid, and defendant could have easily observed the fact that said ore in said chute was not sinking down from the top of said ore chute while the same was being withdawn and removed from the lower portions of said chute, and defendant could have easily warned plaintiff of such fact, or could have taken such precautions to have removed the danger or should have given notice to plaintiff of such danger.

13.

That defendant negligently and carelessly failed to furnish and provide for plaintiff, a reasonably safe place in which to perform his labor and duties, and in which plaintiff could go, be, and work; that in the exercise of reasonable care, foresight and attention, defendant would have known of the danger of plaintiff being caught in said chute, as he was caught,

and defendant knew, and could have known, in the exercise of reasonable care, that plaintiff did not know of, nor appreciate the danger of said ore being in the condition it was in, which condition had been created without his knowledge.

14.

That by reason of the carelessness and negligence of defendant, plaintiff sustained the following injuries, to-wit:

Plaintiff sustained a severe dislocation of the acronio clavicular joint of the left shoulder; a fracture of the ninth and tenth ribs on the right side, and numerous bruises, cuts, and lacerations of a minor nature upon his legs; that his spine was greatly wrenched, twisted, shocked and sprained, and the muscles, nerves, cords and tendons of, in, and about the lumbar region of the back and of the spine were greatly wrenched, strained, sprained, and shocked; that plaintiff has become greatly weakened by reason of said injuries, and is extremely nervous and irritable; that his injuries are all of a permanent nature; that his ability to labor has been greatly reduced and his earning power and capacity has become partially destroyed and is substantially reduced;

15.

That by reason of the facts hereinbefore pleaded, and the negligence of defendant as hereinbefore mentioned, plaintiff has been damaged in the sum of Fifteen thousand ($15,000.00) dollars, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against defendant in the sum of Fifteen thousand ($15,000.00) dollars, and for his costs and disbursements herein.

PLUMMER & LAVIN,
Attorneys for Plaintiff,
Residing at Spokane, Washington.
THERETT TOWLES,
Attorney for Plaintiff,
Residing at Wallace, Idaho.

(Duly verified.)
Filed May 22, 1917.
W. D. McReynolds, Clerk.
By Laurence M. Larson, Deputy Clerk.

(Title of Court and Cause.)
No. 691.
SUMMONS.

THE PRESIDENT OF THE UNITED STATES TO FEDERAL MINING & SMELTING COMPANY, A CORPORATION, THE ABOVE NAMED DEFENDANT, GREETING:

You are hereby commanded to be and appear in the above entitled court, holden at Coeur d'Alene in said district, and answer the complaint filed against you in the above entitled action within twenty days from the date of the service of this summons upon you; if served within any other division of said district, then within forty days from the date of such service upon you; and if you fail so to appear and

answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to-wit: the sum of $15,000.00 damages by reason of personal injuries sustained by plaintiff on account of the negligence and carelessness of defendant on or about the 13th day of January, 1917, while the plaintiff was working in defendant's mine in Shoshone County, Idaho, together with the costs incurred herein, all of which is more fully shown in plaintiff's complaint on file in said court, a copy of which is attached hereto and served upon you.

And this is to command you, the marshal of said district or your deputy, to make due service and return of this summons. Hereof fail not.

WITNESS the Honorable Frank S. Dietrich, Judge of the District Court of the United States, and the seal of said court affixed at Coeur d'Alene, Idaho, in said district, this 22d day of May, 1917.

W. D. McREYNOLDS, Clerk.
By Laurence M. Larson, Deputy.

Plummer & Lavin,
Spokane, Washington.
Therrett Towles,
Wallace, Idaho.
Attorneys for Plaintiff.

In the District Court of the United States in and for the District of Idaho, Northern Division, Holding Terms at Coeur d'Alene, Idaho.

Sheriff's Office
County of Shoshone,—ss.

I, ROBERT H. PFEIL, Sheriff of the County of

Shoshone, State of Idaho, do hereby certify and return that I received the within and hereunto annexed Summons on the 23rd day of May, A. D. 1917, and personally served the same upon Federal Mining & Smelting Company, a corporation, by delivering to and leaving with Frederick Burbridge, its duly authorized agent, appointed pursuant to the provisions of the laws of the State of Idaho, upon whom service of process may be made and service had, personally, in the County of Shoshone, State of Idaho, on the 24th day of May, A. D. 1917, a true and correct copy of said Summons, attached to which was a copy of the Complaint referred to in said Summons, and a copy of the Notice.

Dated this 26th day of May, A. D. 1917.

ROBERT H. PFEIL, Sheriff.
By Dennis Goggin, Deputy.

(Duly verified.)

Filed June 2, 1917.

W. D. McReynolds (Clerk).

(Title of Court and Cause.)

No. 691.

ANSWER.

Comes now the defendant Federal Mining & Smelting Company and answering the complaint of the plaintiff heretofore filed herein, admits, denies and alleges as follows:

1.

Answering paragraph one of plaintiff's complaint as to whether or not the plaintiff is now or was at all

times mentioned in his complaint a resident, or citizen, or inhabitant of the State of Idaho, this defendant has not sufficient information to form a belief, or to answer the same, and therefore denies the same and each and every part thereof.

2.

Defendant admits the allegations contained in paragraph two of plaintiff's complaint.

3.

Defendant admits the allegations contained in paragraph three of plaintiff's complaint.

4.

Defendant admits the allegations contained in paragraph four of plaintiff's complaint.

5.

Answering paragraph five of plaintiff's complaint defendant denies that in entering the said mine it was customary or usual for the plaintiff, or all, or any of the other men doing work in said mine, to leave their buckets containing their lunches at the station on the 1600 foot level or sill floor, and defendant denies that the custom or usage was well known to defendant or was acquiesced in by it, and defendant alleges the fact to be that the plaintiff and the men working in said mine left their buckets in such place or places as best suited their convenience.

6.

Answering paragraph six of plaintiff's complaint as to whether or not on January 13, 1917, plaintiff had left his lunch bucket containing his lunch at the

station on the 1600 foot level or sill floor, this defendant has not sufficient information to form a belief or to answer the same, and therefore denies the same, and further denies that pursuant to any custom or usage which had existed in said mine for some months, or any month prior to the time of plaintiff's alleged injury, or to any custom or usage which was well known, or known at all to the defendant, or acquiesced in by the defendant, at about the hour of 11:20 A. M., plaintiff started to go down to the level or sill floor to get his lunch so that he could eat the same at the proper or usual hour, and denies that in passing along upon the ninth floor, that there was no other way for plaintiff to pass excepting over the top of No. 7 chute, and denies that the space was too narrow on each side, or either side of said chute to make it possible to go around the same, and alleges the fact to be that there was sufficient space on each side of the said chute for the plaintiff, or any other person, to pass along on the said floor without going over or across the top of the said No. 7 chute.

7.

Answering paragraph seven of plaintiff's complaint defendant admits that No. 7 chute was an ore chute, but denies that No. 7 chute was a perpendicular opening about two and one-half feet wide, or about four feet long, and alleges the fact to be that No. 7 chute was a rectangular opening in the floor of said ninth floor thirteen inches wide and three feet long.

8.

Answering paragraph eight of plaintiff's complaint as to whether or not said No. 7 chute was filled with ore so that the top thereof where it opened out on the ninth floor by reason of said ore being therein, formed a practically level or continuous floor, this defendant has not sufficient information to form a belief or to answer the same, and therefore denies the same and each and every part thereof; and defendant further denies that plaintiff, or numerous, or other workmen or employees working in said mine, walked upon the ore in said No. 7 chute in going across and through said ninth floor to the performance of their labor for about a week, or for any time prior to the happening of the alleged accident; and further denies that it was necessary in order to get across said No. 7 chute to walk upon the ore which was piled in said chute, and alleges the fact to be that the distance across said chute would not exceed thirteen inches.

9.

Defendant denies that during three or four days prior to the plaintiff's alleged injury defendant withdrew or removed the ore from number 7 chute from some point below where plaintiff could not observe it, and denies that the ore in the top or upper part or portion of said chute did not sink or lower or drop downward, but for some reason remained in the same stationary condition as it had been prior to the removal of said ore from the lower portions of said chute by defendant, and alleges the fact to be

that the said ore in said chute was drawn out on the day of the alleged injury to the plaintiff, and denies that plaintiff did not know of said ore being removed from below, but alleges the fact to be that the plaintiff did know it and should have known it, and denies that by reason of any custom existing in said mine he assumed or believed that if said ore was taken out or removed from below the ore in the upper part of said chute would sink downward and that he would be thereby advised of just what was going on with reference to the action of said ore in said chute number 7, and defendant alleges the fact to be that the said plaintiff had been working and shoveling into said number 7 chute a day or two prior to the alleged injury, and that the said plaintiff well knew the condition of the said chute and the said plaintiff well knew that ore chutes frequently hung up and had to be loosened, and that by reason of the ore hanging up in said chutes that the defendant employed a man on the said level whose duty it was to loosen the ore in the chutes so that it would drop down, and the defendant further alleges that plaintiff was familiar with the drawing of ore chutes and had been employed by the defendant to loosen chutes that were hung up, and that the plaintiff well knew, or ought to have known, that the top of the said number 7 chute was liable to be hung up and the ore drawn from below and that it was dangerous for the plaintiff to step upon the top of the said number 7 chute or upon the top of any ore chute containing ore and waste.

10.

Answering paragraph ten of plaintiff's complaint as to whether or not on January 13th, 1917, at the hour of about 11:30 A. M. of said day plaintiff was walking across the opening of said number 7 chute upon the ore which was piled therein, the same suddenly and without warning dropped down a distance of more than thirty feet, precipitating plaintiff with it, causing the injuries complained of by plaintiff, this defendant has not sufficient information to form a belief or to answer the same, and therefore denies the same and each and every part thereof, but alleges the fact to be that on or about said date at about one o'clock P. M. of said day the said plaintiff was found in the said number seven chute by the workmen.

11.

Answering paragraph eleven defendant denies that it knew at all times, or any time, while taking the ore out from below in said chute that the upper portions thereof were not sinking downwardly to correspond with the removal of said ore below; defendant denies that it knew that the ore was remaining in the top of said chute in the same manner or position as it had remained in for some days prior thereto, and denies that it did remain in the same position or condition that it had been in for some days prior thereto; denies that defendant knew that the ore in the upper part of said chute was for some reason being held suspended; denies that defendant

knew that plaintiff did not know, and denies that the plaintiff could not have known of said facts; denies that the plaintiff did not know of the danger incident to working on said ore, and denies that the defendant knew that plaintiff, or any other employes, would during the day, or any other time, or at all, walk upon said ore, and denies that the plaintiff was wholly unconscious of the danger or without any opportunity to be advised thereof; denies that defendant knew of the probability or possibility of said ore dropping or collapsing at any time with the plaintiff or any other employe or employes while they were on it or going over it; and alleges the fact to be that the defendant employed a man on the 1600 foot level whose sole and only duty was to loosen the chutes when they hung up, and as soon as it was found that any chute was hung up, that immediately the said employe was directed to go and loosen the said chute so that the ore would drop down and run out at the place where the same was being drawn; denies that the defendant negligently or carelessly failed to take any precautions, or to give any warning or notice, or to do or to perform any action to either inform plaintiff of said condition or to remove the danger threatened therefrom or incident thereto.

12.

Answering paragraph twelve of the plaintiff's complaint defendant denies that the condition of said ore chute and the ore therein had been without plaintiff's knowledge transferred from a condition

of safety to one of danger, and denies that any change in the condition of said ore chute was owing to any negligence or carelessness of the defendant or its agents or servants, and denies that the defendant could have easily observed the fact that said ore in said chute was not sinking down from the top of said chute while the same was being withdrawn or removed from the lower portions of said chute, and denies that the defendant could have easily warned plaintiff of such fact, and denies that it was any duty of the defendant to warn plaintiff of the fact that ore was being drawn from that chute, or from any chute, and denies that the defendant could have taken such precautions, or any precautions, to have removed the danger, and denies that the defendant should have given notice to the plaintiff of such danger.

13.

Answering paragraph thirteen of plaintiff's complaint defendant denies that it negligently or carelessly failed to provide or furnish for plaintiff a reasonably safe place in which to perform his labor or duties, or in which plaintiff could go, or be, or work; denies that in the exercise of reasonable care or foresight, or attention, defendant would have known of the danger of plaintiff being caught in said chute, as he was caught, and denies that the defendant knew, or could have known in the exercise of reasonable, or any care, that plaintiff did not know or appreciate the danger of said ore being in the condition it was in, and denies that the condi-

tion of said ore had been created without the knowledge of the plaintiff.

14.

Answering paragraph fourteen of plaintiff's complaint defendant denies that by reason of any carelessness or negligence of the defendant plaintiff sustained a severe dislocation of the acronio clavicular joint of the left shoulder, or a fracture of the ninth or tenth ribs on the right side, or numerous bruises, or cuts, or lacerations of a minor or other nature upon his leg, or that by reason of any carelessness or negligence of the defendant that the plaintiff's spine was greatly wrenched, or twisted, or shocked or sprained, or the muscles, or nerves, or cords, or tendons in, or about the lumbar region of the back or of the spine were greatly wrenched, or strained, or sprained, or shocked, or that plaintiff became greatly weakened by reason of said injuries, or became extremely nervous or irritable, and alleges the fact to be that if said plaintiff received any of said injuries they were received without any negligence or carelessness on the part of the defendant company. Defendant denies that all or any of said alleged injuries are of a permanent nature, and denies that plaintiff's ability to labor has been greatly reduced or reduced at all, and denies that his earning power or his capacity has been partially destroyed or destroyed at all or substantially reduced, or reduced at all.

15.

Answering paragraph fifteen of plaintiff's complaint defendant denies that by reason of the facts set forth in plaintiff's complaint, or by the negligence of the defendant alleged in plaintiff's complaint plaintiff has been damaged in the sum of fifteen thousand dollars, or any part thereof, or damaged at all, or damaged in any sum whatever.

Further answering the complaint of the plaintiff and for an affirmative defense to said complaint defendant alleges:

1.

That if the said plaintiff was injured on the 13th day of January, 1917, as alleged in plaintiff's complaint he was injured by and through one of the risks of the employment and one of the risks he assumed especially the risk of being injured in the course of his employment by falling or stepping into the open chutes.

2.

For a further separate and affirmative defense to the complaint of the plaintiff defendant alleges that if plaintiff was injured as alleged in plaintiff's complaint he was so injured by his own carelessness and negligence and contributory negligence in this, that he negligently and carelessly walked upon the ore in a chute knowing that the said chute was likely to be drawn at any time and that no notice or warning could be given, or would be given of the drawing of said chute, and knowing that if he was standing

upon said chute at the time that the same was being drawn, that he might be drawn into the ore and waste contained in said chute, and knowing that chutes of this kind frequently became hung up so that the upper portion of the chute would not drop down, and if loosened by pressure or otherwise, might suddenly drop, and might carry any person who might be standing thereon.

WHEREFORE defendant prays that plaintiff take nothing by this action and that defendant recover its costs and disbursements herein expended.

FEATHERSTONE & FOX,
Attorneys for Defendant, Residence and Postoffice Address, Wallace, Idaho.

(Duly verified and service acknowledged.)

Filed July 3, 1917.

W. D. McReynolds (Clerk).

By Laurence M. Larson (Deputy Clerk).

(Title of Court and Cause.)

No. 691.

NOTICE.

TO THE ABOVE NAMED DEFENDANT, AND TO FEATHERSTONE & FOX, YOUR ATTORNEYS:

You, and each of you, will please take notice that on Monday, November 26, A. D. 1917, at the hour of 1:30 o'clock P. M., or as soon thereafter as counsel can be heard, plaintiff will call up for hearing before the Court his motion to amend the complaint in the above entitled action.

Dated at Spokane, Washington, this 23rd day of November, A. D. 1917.

PLUMMER & LAVIN,
Residing at Spokane, Washington.
THERRETT TOWLES,
Residing at Wallace, Idaho.
Attorneys for Plaintiff.

(Duly verified.)
Filed Nov. 26, 1917.
W. D. McReynolds (Clerk).

(Title of Court and Cause.)
No. 691
MOTION.

Comes now the plaintiff in the above entitled action and moves the Court for an order permitting plaintiff to amend his complaint in the above entitled action by adding to, incorporating and making a part of said complaint, to be designated as Paragraph 14½ thereof, the matters and things set out and alleged in the attached proposed amendment.

This motion is made and based upon the records, files and proceedings herein, and upon the affidavits of Angelo Dalo, the plaintiff, and Joseph J. Lavin, one of counsel for plaintiff herein, hereto attached and made a part hereof.

Dated at Spokane, Washington, this 23rd day of November, A. D. 1917.

PLUMMER & LAVIN,
Residing at Spokane, Washington.
THERRETT TOWLES,
Residing at Wallace, Idaho.
Attorneys for Plaintiff.

PROPOSED AMENDMENT.

Paragraph 14½.

That plaintiff further alleges that by reason of said fall he sustained a severe injury to his left groin, resulting in a double inguinal hernia; that plaintiff has suffered great pain from such condition and that plaintiff is informed, and believes, and therefore alleges the fact to be, that in order to relieve said condition a surgical operation must be performed, and that plaintiff will be confined in a hospital for several weeks, and as a result of such operation will suffer great pain and inconvenience; that the reasonable expense of such operation is, and will be, the sum of Two Hundred ($200.00) Dollars, and the plaintiff will incur for hospital fees the sum of One Hundred ($100.00) Dollars expense.

(Title of Court and Cause.)

No. 691.

AFFIDAVIT.

ANGELO DALO, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that at the time of the happening of the injuries alleged in the complaint affiant was in the employ of defendant, and for a period of four and one half (4½) months thereafter was under the care and treatment of Dr. L. E. Hanson of Wallace, Idaho, in the employ of defendant as a physician and surgeon; that during the time affiant was under the care and treatment of said Dr. Hanson he complained to him that he was suffering pain in the left

groin; that Dr. Hanson at numerous times stated to affiant that such condition was due solely to a strain and that the same would be removed within a few weeks time, and that there was nothing serious with reference to such condition, and that the matter was not of sufficient importance to require any treatment; that affiant believed the statements of said physician and surgeon and believed that said condition would be removed, but that said condition continued to grow worse, and that on the 23rd day of November, A. D. 1917, affiant was examined by Dr. R. J. Kearns, a physician and surgeon of Spokane, Washington, and advised affiant that he was suffering from a double inguinal hernia, and that in all reasonable responsibility said hernia was caused and occasioned by affiant falling down the ore chute at the time alleged in the complaint and that said hernia was slow in development, and that said hernia was now well defined and discoverable upon examination; that affiant was advised by said Dr. Hanson that said hernia will continue to get larger and serious complication will result unless affiant submits to a surgical operation for the purpose of removing said hernia;

That affiant, at no time since the institution of this action, knew, or had any information with reference to such condition, and at no time knew that he was suffering from hernia, and that the first information that affiant received with reference to such condition was communicated to him on November 23, 1917; that the condition from which affiant

suffers is one which is extremely serious, and that he is advised that the expenses of the operation, which the surgeon advises him is necessary, will cost upwards of Two Hundred ($200.00) Dollars, and he will be required to be confined in a hospital for several weeks, and affiant desires to include in his complaint in the above entitled action, a claim for damage because of such condition and the expenses that will be necessarily incurred in order to relieve him from such condition.

ANGELO DALO.

(Duly verified.)

(Title of Court and Cause.)

No. 691.

AFFIDAVIT.

JOSEPH J. LAVIN, being first duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above entitled action, and is familiar with all of the facts and circumstances involved in such action; that on November 20, 1917, affiant requested the plaintiff in the above entitled action to come to Spokane for the purpose of having a physical examination made by Dr. R. J. Kearns of Spokane; that such examination was made by said Dr. Kearns on Friday, November 23, 1917, at the hour of eleven o'clock A. M., and that in making such examination Dr. Kearns advised affiant and the plaintiff that plaintiff was suffering from a double inguinal hernia on the left side, which was slow in development, and which, in its present condition, is ex-

tremely serious, and that an operation is necessary in order to relieve such condition; that in all reasonable probability such condition was caused and occasioned by the fall into the shaft, as alleged in plaintiff's complaint; that said surgeon advised plaintiff to undergo such operation, and likewise that the reasonable expense of such operation would be upwards of the sum of Two Hundred ($200.00) Dollars, and be attended with considerable pain, and that plaintiff will be required to go to a hospital for several weeks for such operation; that affiant did not know, prior to said date, that such condition existed, nor did the other counsel for plaintiff.

(Duly verified.)

Filed Nov. 26, 1917.

W. D. McReynolds (Clerk).

(Title of Court and Cause.)

No. 691.

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at $5000.00.

W. H. BELL, Foreman.

Filed Nov. 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 691.

JUDGMENT.

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of

twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the argument of counsel and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged, that said plaintiff have and recover from said defendant the sum of Five Thousand ($5000.00) Dollars, together with said plaintiffs costs and disbursements incurred in this action, amounting to the sum of $91.30, and judgment is hereby entered in accordance with the order of the court.

Dated November 30th, 1917.

W. D. McREYNOLDS, Clerk.

Filed Nov. 30, 1917.

W. D. McReynolds (Clerk).

(Title of Court and Cause.)

No. 691.

STIPULATION.

It is hereby stipulated and agreed by and between the respective parties acting through their respective attorneys, that the defendant, Federal Mining & Smelting Company, may have until February 15, 1918, in which to prepare, serve and file bill of exceptions, and to obtain writ of error with super-

sedeas in the above entitled action, and that execution be stayed in the meantime.

PLUMMER & LAVIN,
THERRETT TOWLES,
Attorneys for Plaintiff.
FEATHERSTONE & FOX,
Attorneys for Defendant.

Filed Feb. 12, 1918.
W. D. McReynolds (Clerk).

In the District Court of the United States for the District of Idaho, Northern Division.

ANGELO DALO *Plaintiff,*

vs.

FEDERAL MINING & SMELTING COMPANY, *Defendant.*

No. 691.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore and on, to-wit, the 28th day of November, 1917, being one of the days of the November term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich, Judge of the said court, and a jury duly impaneled for the trial of said cause, this cause came on for trial upon the complaint of the plaintiff and the answer of the defendant filed herein, Plummer & Lavin, Esqs., and Therrett Towles, Esq., appeared as attorneys for plaintiff and Featherstone & Fox, Esqs. appeared as attorneys for the defendant. Whereupon the following proceedings were had:

MR. FOX: If Your Honor please, at this time I might say that the defense of fellow servants is not pleaded. There was some question raised as to whether or not it should have been pleaded, and upon the last trial, my idea was that it need not be pleaded in order to take advantage of that.

MR. PLUUMMER: This is the first trial of this case.

MR. FOX: I understand that, but the last trial, I mean, and the reason it wasn't pleaded is that we did not know whether the question would be involved in this case, and we do not know yet, so that if in the course of the trial it appears necessary to plead it I would like to have an opportunity to amend the answer by inserting that defense.

MR. PLUMMER: I am willing to be liberal with amendments, if counsel will be as liberal as I am, in case I should wish to amend. I am willing to concede those amendments during the trial, and consent to it.

MR. FOX: There is no chance of being taken by surprise by that amendment, counsel.

MR. PLUMMER: The surprise would be this, that we wouldn't be equipped with the authorities on that question, which, of course, when it isn't pleaded, we don't anticipate that it will be an issue, but regardless of that we consent to it.

MR. FOX: I think the Federal authorities usually hold that it isn't necessary to plead it.

MR. PLUMMER: It is just the other way, if Your Honor please.

THE COURT: My impression is that it is necessary to plead it if you are going to introduce evidence upon it yourself, but it isn't necessary to plead it if it appears from the plaintiff's own evidence.

MR. PLUMMER: That is the correct rule.

MR. FOX: I don't know, upon the state of the pleadings, whether the question is one in issue, or to be one in issue.

THE COURT: You may proceed, of course. I can only say now what you already know, that I will permit you to amend in that respect, providing it doesn't do injury to the other party.

MR. PLUMMER: May it please the Court, and gentlemen of the jury, it is now my duty to explain to you what we expect to prove in this case. Mr. Dalo, the plaintiff in this case, is a resident and citizen of the State of Idaho, residing with his family at Mullan, in this state, and during that time was in the employ of the defendant company as a mucker. Now, a mucker, while some of you probably know what that means, maybe some don't,—a mucker is a man who performs the mucking, who shovels the muck, the ore or rock, shovels it out from where it is blasted to some receptacle of some kind, into a chute, or something else, but the fellow who handles that stuff is a mucker, and Mr. Dalo was a mucker in the employ of this company. The company in its underground workings, which are very extensive, has what is called stopes. A stope is an apartment in a mine —it may be five feet wide,—something in the shape of an ordinary tunnel, or, it may be twenty or thirty

or forty feet wide; it is where they stope ore out. Regardless of its size, it would be called a stope, distinguished from a tunnel, which you simply pass through in getting to the ore.

During the time that Mr. Dalo worked for this company it had been the custom, I think all of the time, for a number of months, for the men to eat their lunch at about half past eleven, and for the purpose of having their lunch with them they would bring it there in lunch buckets, like the ordinary lunch bucket that the workman takes with him when he takes his lunch, and the men would deposit these lunch buckets at a certain part in the mine, in one of the stopes of the mine. That had been the custom all along, and the masters knew it, the bosses knew it, and acquiesced in it. All the men did that. In this particular stope where this accident occurred, it extends for probably a half mile in length, maybe longer,—I don't know. And every 25 or 30 feet or 35 feet there is what they call an ore chute, that is, an opening in the floor in this stope down through which ore is thrown into a square, well-shaped arrangement, called an ore chute, down to some lower level, in the lower part of the mine, where it can afterwards be taken out in cars, and milled, or whatever they want to do with it. Sometimes the holes would be on one side of the stope, sometimes on the other, and sometimes in the middle. Mr. Dalo's work was principally in another part of the mine. Possibly it will be shown that it was in this same stope, or maybe other stopes,—I am not sure about that.

The particular place that he fell down was an ore chute, I forget the number, but that will be disclosed in the evidence. That ore chute had been filled with ore for two or three weeks, clear up to the level of the floor of this stope where he was walking when he got hurt, and extended clear down to the lower part, where they would take it out when they got ready for it. During that time, Mr. Dalo, in going and getting his bucket to eat his lunch as other men did right along there, would walk along the floor of this stope and across this same place where he afterwards fell, over the ore, get his lunch bucket, and either take it out or eat it there, I don't know which. We will show that there was a regular path across the top of the chute, across this ore, which had been beaten there by the numerous men that walked across there during the several weeks that this hole had been filled, this chute. Ordinarily when they draw a chute, that is, when they take the ore out from below, as we all know, from the force of gravitation, the ore will sink down from the top, and when it is taken out it will disclose a hole there that the men can see, and, of course, they won't walk into it. In this particular instance, however, the ore was, by orders of the company, drawn out from below, but for some reason or other a certain amount was allowed to hang up on top, right on the floor, the same as it had been. In other words, the floor wasn't changed at all in appearance. That remained there and didn't fall with the rest of the ore, so that a man walking along on this stope wouldn't know that it

had been drawn out at all. Ordinarily when that does occur, it don't occur very often,—but when it does occur, a man is sent up there with a bar to bar that down. In this case, we expect to show that the ore had been drawn from below about half past eight in the morning, and no effort was made by the company in barring down this part that was hung up on this floor at all; and Mr. Dalo, in the usual and ordinary way, and according to his customs, walked along there for the purpose of getting this lunch bucket, and when he came on top of this ore it went right down with him, and he dropped about 35 or 40 feet, I think, sustaining very serious injuries.

We expect to show that that stope at that place was only about 5 feet wide; that Mr. Dalo, while he had a general knowledge of these chutes, didn't know where this particular hole was, because the whole floor of the stope, clear from wall to wall, was covered with ore, and he couldn't tell whether it was here or there, or where it was, and he walked in the usual way, where they had been walking for weeks, and without any knowledge on his part that they had drawn down this ore; and the first thing he knew he went down. That is practically our case.

The injuries will be testified to by the doctors, and they can explain them better than I can.

JOHN C. BROWN: Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows.

DIRECT EXAMINATION.

BY MR. PLUMMER:

Q. States your name, Mr. Brown.

A. John C. Brown.

Q. You came down here as a witness for the company, didn't you?

A. Yes sir.

MR. FOX: I object to that. It is immaterial.

MR. PLUMMER: Q. You were the shift boss of this particular level on which the plaintiff was injured?

A. Yes sir.

Q. At the time of the injury?

A. Yes sir.

Q. I wish you would describe, for the information of the Court and jury, what is meant by the term "level" in a mine. What constitutes a level?

A. A level is a drift on the lead where they build the chutes, and tram the ore out.

Q. What is the distance usually between levels?

A. In this mine—

Q. In this mine, I speak of now.

A. Two hundred feet.

Q. I had reference to the Morning mine. Two hundred feet from level to level?

A. Yes sir.

Q. And in between those levels, those places we call levels, there are certain rooms, aren't there, or at least floors?

A. Floors, yes sir.

Q. What is the purpose of these floors?

A. They are put there to work on and to hold up the walls of the mine.

Q. Let me see if I understand that now. For instance, here is the floor of a level—

MR. FOX: Floor of the level, counsel?

MR. PLUMMER: Yes, the floor of the level.

MR. FOX: You are talking about the level?

MR. PLUMMER: Yes.

Q. And there is ore here that you want to take out. You take the ore out, and then when you can't reach any more you construct a floor up there about eight or nine feet high, and then stand on that floor and continue the stoping?

A. Yes sir.

MR. FOX: The ore is taken out going ahead, and not going upwards, you understand.

MR. PLUMMER: Q. Going ahead and upwards too, I suppose. You keep extending the floors up as long as the ore lasts?

A. Yes.

Q. And keep taking the ore out both at the end and the top. Do you recall the accident to the plaintiff, Mr. Dalo? Do you recall the occurrence of his getting hurt?

A. Yes sir.

Q. And you know the chute down which he fell?

A. Yes.

Y. What is the number or designation of that particular chute?

A. Number six.

Q. On what level?

A. The 1600 level.

Q. I think you testified that you had charge of that level at that time?

A. Yes sir.

Q. As shift boss?

A. Yes sir.

Q. First I will ask you what floor was that that he was on when he got hurt. Do you know the name of it or the number of it, or was it a floor?

A. Number eleven.

Q. Floor Number eleven, 1600 level, and Number six.

THE COURT: Number six what?

MR. PLUMMER: Number six ore chute.

Q. How many other ore chutes were on that same floor leading down to the lower workings of the mine at that time?

A. In that stope?

Q. Yes.

A. Twenty-two.

Q. Twenty-two?

A. Yes.

Q. And how far apart are they usually built?

A. Twenty-five feet.

Q. What is the purpose of these ore chutes? What are they used for?

A. Used to put the ore in.

Q. What for, what do you put it in for?

A. To get it out of the mine.

Q. And those ore chutes are ordinarily constructed in a square form, aren't they? That is, just the

same as a square well would be, instead of a round well?

A. They are not exactly square.

Q. Well, I mean substatially,—but I mean they are not round?

A. No sir.

Q. And about what is the size, in diameter?

A. Two and a half by three, or three by three.

Q. When those ore chutes are filled up with ore, I take it the ore is taken out by means of letting it out from below, isn't it?

A. Yes sir.

Q. You are now the foreman of the mine, aren't you?

A. Yes sir.

Q. You have been promoted since that time?

A. Yes sir.

MR. PLUMMER: That is all.

CROSS EXAMINATION

BY MR. FOX:

Q. In order to make the workings all perfectly clear, Mr. Brown, I will ask you if this is not a fact, that as you go down in the shaft every 200 feet a station is built?

A. Yes sir.

Q. And from that station a drift is run off to where this ore body is?

A. Yes sir.

Q. The ore body is a long body, lenticular body, isn't it, that extends for numbers of hundreds of feet?

A. Yes sir.

Q. And is wide, from five to possibly twenty feet, in places?

A. Yes, and wider.

Q. And even wider than that?

A. Yes.

Q. Then when you get to the ore body with this cross-cut or drift to it, you drift upon the ore?

A. Yes sir.

Q. The first drift on that ore, on that particular level, is called the level, isn't it?

A. Yes sir.

Q. And from there raises are made upwards on the ore, and when the ore is taken out this timbering is put in, and the flooring is put on top of the timbering, isn't it?

A. Yes.

Q. These floors are all about nine feet apart, aren't they?

A. Yes.

Q. And extend up to the next level above?

A. Yes.

Q. Now, the level so called, that is, the first place where you drive the drift on the ore from each level, is a working level, isn't it?

A. Yes.

Q. That is, the chutes, the mouth of the chutes is there, and the tram cars are there that trams the ore and other stuff to the shaft, and they take in the tools and stuff through that level?

A. Yes.

Q. The tools and material are taken up on to the various floors where they may be working above the level?

A. Yes sir.

Q. And the men get off at their particular level and walk up and manways?

A. Yes.

Q. Now, from the level these chutes extend, what they call these ore chutes, ore bins, they are, really, aren't they?

A. Chutes.

Q. But it is a bin, isn't it??

A. No, I guess you would call them a chute.

Q. How far apart are those chutes?

A. Twenty-five feet.

Q. Is that a fixed and definite distance?

A. Yes sir.

Q. That is uniform, is it?

A. Yes.

Q. Now, these chutes, as I understand it, are carried upward from floor to floor as the work progresses upward?

A. Yes.

Q. For instance, if the men are working on the third floor above the level, both east and west, as they progress east and west these chutes are built?

A. Yes sir.

Q. And when that entire level is mined out, the chutes are taken up to the next floor?

A. Yes sir.

Q. Or extended up. They are extended up. Now,

where are the manways placed with reference to these chutes?

A. The manways alongside of each chute.

Q. The manways are the ladders upon which the men can climb to the various floors?

A. There is a manway alongside of each chute.

Q. Now what is the fact as to whether or not slide chutes are built at times, which extend from the opening or from any particular floor, to the floor above, without carrying up the chute to the next floor?

A. There is slide chutes built.

Q. And who builds these slide chutes?

A. The mucker.

Q. What is the function, — what is the use of those?

A. To slide the ore into the chute, instead of shoveling it.

Q. That is, from the floor above?

A. Yes sir.

Q. Just explain to the jury why it is that these slide chutes are put in, instead of carrying the chutes up to the next floor. Suppose they want to use this particular chute from the floor above where it ends.

A. You have got to remove the ground on the floor above before you can raise the chute. If you raise you couldn't shovel in to it.

Q. In other words, it becomes necessary sometimes to put material into the chute from two floors, is that correct?

A. From the floor above.

MR. FOX: I don't know whether you inquired of him as to the location of this particular chute, excepting that it was Number six chute. Did you inquire as to the conditions concerning that?

MR. PLUMMER: No, I didn't ask him. I don't want to be bound by his answer on that.

MR. FOX: I think that is all.

REDIRECT EXAMINATION

BY MR. PLUMMER:

Q. The place where the ore was taken out of this particular chute down which the plaintiff fell, that was also on your level, wasn't it?

A. Yes sir.

Q. That is, I mean you was boss over that level?

A. Yes sir.

MR. PLUMMER: That is all.

MR. FOX: That is all, Mr. Brown.

MR. PLUMMER: I will call Mr. Dalo. Mr. Cozzetto may be sworn as interpreter. Mr. Dalo doesn't talk very good English, and I will ask for an interpreter.

Mr. R. Cozzetto was thereupon sworn as interpreter.

ANGELO DALO: Produced as a witness in his own behalf, being first duly sworn, through an interpreter, testified as follows.

DIRECT EXAMINATION

BY MR. PLUMMER:

Q. Now, Mr. Dalo, in answering the questions, speak loud and distinctly so that the Court and jury

can understand as to those things you understand yourself. He can understand some, but not very good. What is your name?

A. Angelo Dalo.

Q. Where do you reside?

A. Mullan.

Q. State whether or not you live there with your family.

A. Mullan, with my family.

Q. As your home?

A. Yes sir.

Q. What is your age?

A. 53.

Q. You are the plaintiff in this action, are you?

A. Yes sir.

MR. PLUMMER: You admit the employment, don't you, Mr. Fox?

MR. FOX: Oh yes.

MR. PLUMMER: Q. At the time you were working for the Federal Mining & Smelting Company in the Morning mine, how long had you been working there before you were hurt?

A. Eight or nine months.

Q. What class of work were you doing during that time?

A. Shoveling, mucker.

Q. On what level, if you know?

A. Level sixteen.

Q. Who was your shift boss?

A. Mr. Brown.

Q. That is the gentleman who testified a moment ago?

A. Yes sir.

Q. During the time that you worked on this level under Mr. Brown, what was the custom of yourself and men working at the same class of employment that you were working at, that is, muckers, with reference to placing your lunch buckets in the stope?

A. In the drift.

Q. I used the word stope. I meant the drift. I asked him what the custom was. Tell him to tell what they done.

A. He didn't get my question right. He answered that it was customary to fill the chutes.

Q. What did you and the other muckers do with your lunch buckets when you brought them into the mine every day when you worked there?

A. We brought the buckets to eat in.

Q. I know he brought it to eat, but what did he do with it when he brought it in the mine, before he would eat?

A. We put it in the drift.

Q. How long had that custom continued, of placing these buckets in the drift where he placed them, by himself and the other men, other muckers working there?

A. Always; he always put them there.

Q. How many muckers were working there on that level besides yourself?

A. I can't exactly tell, because oftentimes there was lots of men there, and lots of times less.

Q. Tell him to give some idea so that the Court and jury can have some idea as to how many men on an average worked as muckers on that level.

A. About ten or twelve.

Q. And what time of day did you and these other muckers go to get your lunch buckets and eat your lunch?

A. Between half past eleven and twelve o'clock.

Q. Was that every day?

A. Every day.

Q. Ask him whether or not all the muckers did that?

A. Those that were working in this place would put these buckets there, and others that were working in other places would put them in other places.

Q. The ore chutes, that is, the openings in that stope or drift, the openings to the ore chutes, where were they situated with reference to the center of the floor of the drift?

A. I don't know, because the hole was covered.

Q. He didn't quite get my question. State whether or not the openings to the ore chutes down which the ore was thrown were sometimes on one side, sometimes on the other, and sometimes in the middle. I want to get that, what the fact is.

A. If there was plenty of space, they placed them in the middle. If the place was small they would place them to one side.

Q. Did you know where every hole was located, which was the opening of these different ore chutes?

A. No, because they were covered, and this was covered, and I couldn't see it.

Q. State whether or not you fell down Number six ore chute on the day that you were hurt, and for which injuries you are bringing this law suit?

INTERPRETER: No. six, you say?

MR. PLUMMER: Yes, Number six.

A. Yes.

Q. What were you doing when you fell down it?

A. I hurt myself.

Q. But what were you walking across it for, where were you going just before you fell, or when you did fall?

A. I was going to eat my lunch.

Q. State whether or not you going in the same manner in which you had been going all the time that you worked there, and in which other men had been going over the same ground, for the same purpose.

A. Yes sir.

Q. How many other men have you seen walking across this same place where you were walking when you were hurt, before you were hurt, each day?

A. Sometimes six or eight, sometimes eight or ten, sometimes two or three; it depended.

Q. State whether or not there was any path of anything across this ore where you fell, showing where men had been walking, like a beaten path, or anything of that kind.

A. Yes sir, sure.

MR. FOX: Of course, if Your Honor please, all these questions are leading.

MR. PLUMMER: That was a little leading, but not all of them.

MR. FOX: Yes, all of these have been leading. The answers elicited so far have been yes or no, counsel.

MR. PLUMMER: I will try not to lead any more than—

Q. How long had that chute been filled up, and you and the other men walking across it as you have described, before the day you fell, how many days before?

A. I believe ten or twelve days.

Q. How wide was the stope at that place?

A. About six feet.

Q. What was on the floor of the stope, if anything, which covered this hole that formed the mouth or opening of the ore chute?

A. Material.

Q. What kind of material?

A. Ore.

Q. State whether or not the ore extended from wall to wall, covering this space?

A. Yes sir.

Q. How long was this body of ore, Mr. Dalo?

MR. FOX: What do you mean,—the muck pile?

MR. PLUMMER: The length, I have asked the length,—I have asked him about the width.

MR. FOX: You mean the ore chute or the—

MR. PLUMMER: No, the material. I want to get the length of it.

Q. At what distance was the ore spread over run-

ning lengthwise of the stope, as distinguished from crosswise?

A. About seven or eight feet.

Q. When you walked across there did you know exactly where the opening was?

A. No sir.

Q. Why?

A. Because I could not see it.

Q. How was that stope lighted? What kind of lights did you have, if any?

A. Carbide lamps.

Q. Was there any other light in the stope except your carbide lamp when you were walking across this chute?

A. No sir.

Q. From your experience in that mine and in mining, when the ore is taken out below from one of these ore chutes, what does that do to the ore on top?

A. I don't know.

Q. Well, I guess he don't understand. I don't want to lead him. That is the reason I am trying to avoid that. State whether or not, ordinarily, that is, on other occasions, at other times, when the ore is taken out from below, if the ore sinks at the top?

A. Yes.

Q. Did you ever know of the ore staying on top as it stayed when you fell, after it had been taken out below? Did you ever know that to occur before?

A. No sir.

Q. Did you ever have anything to do with drawing it out, that is, taking the ore out below?

A. No sir.

Q. Who had charge of that kind of work, if you know, in that mine, on that level?

A. The motor man.

Q. And who was he under, who was over him by way of a boss, I mean.

A. The boss.

Q. What boss?

A. Mr. Brown.

Q. Now, when you were walking along on this ore that you have described, when you got over this ore chute, what happened to you?

A. Before this day there has never been anything happened to me, but this day as I was walking past this place I went down into this hole.

Q. How far did you fall, if you know, about how far, if you can give me any idea.

A. About three and a half floors.

Q. I think the testimony is that they are about nine feet apart?

MR. FOX: I think you allege 25 or 30 feet in your complaint, counsel.

MR. PLUMMER: All right. That is near enough.

Q. Did you get hurt?

A. At first I felt only a pain in my ribs here, and I had not felt a pain on the other side.

Q. How did you get out after you fell?

A. A man came down and tied me with a rope.

Q. And lifted you out, I presume?

A. Yes sir.

Q. And where did they take you to?

A. They brought me out to the level, and then we went to the drift.

Q. I want to find out if you got to the hospital?

A. Yes sir.

Q. How long did you stay in the hospital suffering from these injuries?

A. Fifteen days.

Q. Did you suffer any pain while you were in there from these injuries?

A. Yes sir.

Q. Where was this pain that you speak of?

A. All over.

Q. I guess that covers it. Was the pain bad or was it a slight pain?

A. It was rather strong than weak.

Q. Do you know whether or not your left shoulder was broken?

A. I didn't know. I only knew that I could not raise my left arm.

Q. What doctor attended you?

A. Mr. Hansen.

Q. Dr. Hansen, I suppose you mean?

A. Dr. Hansen.

Q. Since you came out of the hospital state whether or not you have felt any pain in your shoulder, in your left shoulder?

A. I feel pain here (indicating the left shoulder), down here (indicating about the stomach), and down low towards the abdomen, and under here where I have broken ribs.

Q. How many ribs were broken, if you know?

A. They told me that two of them were broken.

Q. You mean the doctor told you that?

A. Yes sir.

Q. Just stand up here now and face the jury. How far can you raise that left arm? Raise it just as high as you can.

(Witness raised arm.)

Q. Why can't you raise it any higher?

A. I can't do it.

Q. Why?

A. It hurts me.

Q. Let it down. Close your left hand as far as you can. Is that as far as you can close it?

(Witness did as requested.)

Q. Is that as far as you can close it? I am not going to hurt you.

MR. PLUMMER: Would there be any objection, Your Honor, to having the jury examine that hand?

MR. FOX: He has testified how far he can close it.

MR. PLUMMER: Let them feel of it and anything they want to.

THE COURT: Oh no.

MR. FOX: The jury cannot tell any more. The question is whether he can close his hand or not.

MR. PLUMMER: All right.

Q. Why can't you close your hand? Why can't you close your hand that you speak of?

A. Since I have got hurt I never could close it any more.

Q. I want to find out where it hurts him, whether or not it hurts him to try to close it, is what I want to find out.

A. Yes sir, it does.

Q. Can you handle a pick or shovel or any of the tools which you usually handle in mining, with that left hand?

MR. FOX: Just a moment. That is calling for a conclusion, if Your Honor please.

MR. PLUMMER: I don't think that is a conclusion?

THE COURT: Sustained.

MR. PLUMMER: Q. State whether or not you have to use your left hand in handling mining tools, if you work at that business.

A. The right hand is the most used, but I have to also use the other.

Q. Are you about to do any work now of the kind that you have been used to doing, and the kind that you know how to do?

A. No sir.

Q. How long has your hand and shoulder been in the condition which you say it is in?

A. Ten months, since I got hurt.

Q. You were examined, were you, night before last, by two doctors in this town, down at the hotel, were you, Mr. Dalo?

A. Yes sir.

Q. State whether or not you stripped off everything at that time.

A. Yes sir, everything.

Q. And this examination was in my room at the Hotel Idaho, wasn't it?

A. In the Hotel Idaho.

Q. Do you know the doctors that examined you? I guess they are both out now. I guess there won't be any dispute about that.

A. They are not in here.

Q. Now, stand up. Turn around. When the doctors were examining you did you feel any pain, pricking in the left side of your body by the doctors?

THE COURT: Just a moment. That is leading, I think.

MR. PLUMMER: I don't know how to put it, Your Honor.

MR. FOX: I think, if Your Honor please, that is a matter that the doctors should testify to, and the results of their observations.

MR. PLUMMER: I am going to prove his feeling. He can testify to his feelings.

THE COURT: He can testify to what his feelings were, of course, but I think counsel should be very careful to avoid leading questions.

MR. PLUMMER: Q. During the time the doctors were examining you, did you feel anything on your left side?

A. No sir.

Q. Did you feel anything on the right side that the doctors did to you, if anything?

A. Yes sir, I could feel right away.

Q. What?

A. They were pricking me with needles.

Q. Sit down. This condition of the abdomen which ordinarily people call belly, how has that acted, or what has happened since the accident occurred

that didn't appear right after the accident, if anything?

A. Immediately after coming out of the hospital I felt bad in the abdomen, but before that I had not felt anything.

Q. Since you have been out of the hospital have you had any accident or done any work or strained yourself in any way?

A. No sir, nothing.

Q. What was your condition of health before you got hurt?

A. Well.

Q. When you walked on this ore and fell, state whether or not you expected anything of that kind to happen?

A. No sir, I did not.

Q. What were you think of, if anything, at that time?

A. I was thinking, well, I was going to eat.

MR. PLUMMER: That is all, I think.

A JUROR: I would like to ask one question, Judge.

THE COURT: Very well.

JUROR: Was he working there and helping fill this chute when it was first filled?

A. No sir.

JUROR: It was already filled when he first started to work there, was it?

A. Yes sir.

JUROR: That is all.

MR. PLUMMER: How long was you down in

this chute after you fell before they pulled you out, as near as you can recollect?

A. About two and a half hours.

Q. State whether or not you were suffering any pain while you were down there?

A. I only suffered pain here (indicating his right side).

Q. Where were you born?

A. In Italy.

Q. State whether or not you have been naturalized as a naturalized citizen of the United States.

A. Yes sir.

Q. You have got your papers, have you?

MR. FOX: He says he is naturalized. There is no question of it, counsel. Possibly it would not be material anyway, whether he was naturalized or not. He would have a right to recover under the same conditons that one would have who wouldn't be naturalized.

MR. PLUMMER: That is all.

CROSS EXAMINATION

BY MR. FOX:

Q. Mr. Dalo, you were working on the same floor on which you fell into the chute?

A. I went there only that morning.

Q. Just before he got hurt he was working on the same floor, ask him that.

A. I had worked around there for quite a while, but for a few days they sent me to another place to go to work at.

Q. We will get to that a little later. I am asking

him, on the day on which he was injured, that is, on the day on which he fell down that chute, wasn't he working on the same floor that he fell down from?

A. Yes sir.

Q. He was working on the next chute, mucking into the next chute west?

A. Yes sir.

Q. That would be 25 feet from the chute into which he fell?

A. Yes sir.

Q. Now, how long had he worked at that chute?

A. Only that morning.

Q. Had he ever worked on that floor before?

A. Quite a long time before that.

Q. How long before that?

A. I cannot just exactly tell, because they changed me from place to place, — very likely a month.

Q. On what floor had he been working for a month previous to that day on which he was injured?

A. I had worked on one floor above and another floor further away.

Q. What does he mean by a floor further away? Does he mean a floor further up or further down?

A. I have worked all over that place. There is floors above and there is floors underneath.

Q. But he had not worked on the floor on which he was injured for at least a month prior to the time that he was injured?

A. Yes, I had worked there for about a month before. I worked there about a month before, yes.

Q. But on that particular floor he had not worked for a month prior to that time?

A. I couldn't just exactly tell, because they would pull up the chutes.

Q. Well, I understood him to say that he had not worked on that floor from which he fell and was injured for at least a month before the day of the accident.

A. I could not just exactly say a month. I might have worked there fifteen or twenty days before that. The reason is that whenever they have an opportunity they pull the chutes up.

Q. But at least he hadn't worked there for fifteen days before that?

A. Not on that floor.

Q. Now, when you went up to the floors above or below, you went up the manway either east or west of this particular chute?

A. From the place where I was, I was going east.

Q. You went up one of the manways east of this chute?

A. Yes.

Q. What manway was it?

A. To go up above there was only one manway.

Q. What was the number of the manway that he went up?

A. I do not remember whether it was eleven or twelve.

Q. Eleven or twelve. Didn't he allege that it was Number three?

MR. TOWLES: No. He said to go from this

floor he was on above there—you mean from the station level, don't you?

MR. FOX: From the level, just describe to the jury how you would go to the floors above the floor on which you were injured.

A. I crossed this chute where I fell, and then take the manway and go up.

Q. How did he get to the floor on which he fell, from the main drift?

A. I would go from the same direction.

Q. Now, do I understand you to say, Mr. Dalo, that you passed over this place every day for two weeks, and it was in the same condition?

A. About ten or twelve days, as near as I could tell.

Q. And that chute was in the same condition for ten or twelve days?

A. Yes.

Q. How long a time had you passed over that chute or by that chute, how many weeks or months?

A. It depended on when the timber man would call me to take out the caps.

Q. He doesn't understand my question. It seems to me it is plain. How long had he passed over this chute, had he been in the habit of going over this chute, how many months?

A. Ten or twelve, or maybe fifteen days.

Q. Fifteen days. Prior to that time he had not passed across that chute, is that correct?

A. I would go by there on another place.

Q. He would go by there?

A. He would go by at another place.

Q. In other words, he wants the jury to understand that on the day he was injured was the first time that he knew there was a hole in that floor?

A. I knew there was a chute there before.

Q. He knew there was a chute there, did he?

A. Yes sir.

Q. Now, how big is the hole in those chutes, usually?

A. Between twenty and twenty-four inches in width, and about four feet in length.

Q. He doesn't know then how large the opening was into this chute, does he?

A. No.

Q. Now, I will ask you, Mr. Dalo, isn't it a fact that you have actually mucked into the hole in this chute?

A. No sir.

Q. You never have?

A. No.

Q. Who filled this chute? What muckers?

A. I don't know.

Q. When did the muckers fill that chute?

A. I don't know. I seen it filled for quite a while. I don't know who filled it.

Q. How does he know that that chute was drawn three or four days before he fell into it?

MR. PLUMMER: Just a moment. He didn't say it was drawn three or four days before, and that isn't proper cross examination. He doesn't expect to testify to when it was drawn. I expect to prove that

by another witness. He hasn't testified to it at all.

MR. FOX: It seems to me he swears to it in his answer directly.

MR. PLUMMER: But I can prove it by some other witness, I can prove the fact, can't I?

MR. FOX: Very well.

Q. Now, Mr. Dalo, do I understand you to say that you never had heard of a chute hanging up before the day of your accident?

A. No sir.

Q. Isn't it a fact that you yourself have been sent up to knock down chutes that have been hung up?

A. No sir.

Q. You never have been?

A. No.

Q. How is Mr. Millette?

A. He is an Italian.

Q. Isn't he the gentleman with whom you have been going around the streets here since you came to try this lawsuit?

A. Yes sir.

Q. He talks the Italian language, doesn't he?

A. Yes.

Q. You are able to talk with him, you are able to understand him and talk with him?

A. Yes sir.

Q. Now isn't it a fact, in the first place,—he is one of your witnesses here, isn't he?

MR. PLUMMER: If Your Honor please, I don't think that is proper cross examination.

MR. FOX: Just a minute. This is simply preliminary.

MR. PLUMMER: We admit that he is a witness, and we are going to call him next.

MR. FOX: If you admit that he is a witness, all right.

Q. Isn't it a fact, Mr. Dalo, that Mr. Millette was what they called the chute tender, whose duty it was to knock down chutes that had hung up?

MR. PLUMMER: Just a moment. We object to that as not cross examination, as to what some other man's duty was. They can't prove fellow servants by cross examination on a subject that we haven't gone into, if that is the object, and, if it isn't the object, it is not proper cross examination; and it is certainly improper at this time to prove that somebody else ought to have done something they didn't do.

MR. FOX: If Your Honor please, the object of it is to show that he actually knew that these chutes were hung up there, and that he knew that it was this man's duty to knock down the chutes.

THE COURT: The objection is overruled.

MR. PLUMMER: Maybe I didn't quite make myself clear on another point of the objection. I have no objection to the witness testifying as to what he now knows as to what Mr. Millette's duties were, but I think the question could be confined to the time of the accident.

MR. FOX: That is all right.

THE COURT: Read the question, Mr. Reporter.

(Question read.)

MR. FOX: Q. And didn't you know that that was his duty before the time you had this accident?

A. I don't know.

Q. In other words, you want the jury to understand that you did not know that the company employed men who attended to these chutes and to knock them down when they hung up?

A. I don't know nothing about that.

Q. How long had you worked in this particular stope?

A. I worked in this stope for quite a while.

Q. How many months had he worked in this stope?

A. Well, this stope is a long stope and I worked there about five or six months.

Q. Five or six months?

A. Yes sir.

Q. How long has he been mining?

A. About fifteen or twenty years.

Q. And during that fifteen or twenty years what kind of work has he done in mines?

A. Miner in tunnels, contractor.

Q. Worked in stopes before?

A. No, always in tunnels.

Q. But for about nine months while he was working for the Morning mine, for the Federal Mining Company, he had worked in a stope as a mucker?

A. Yes, and I worked sometimes in the drift also.

Q. Now ask him this question: When are these chutes drawn?

MR. PLUMMER: Just a moment, if Your Honor please. I object to that as not cross examination. I haven't asked him anything about drawing of these chutes at all. I haven't suggested it through this

witness. I simply proved that he fell through this chute. I don't want to be bound by some answer that he doesn't know anything about.

THE COURT: He may answer this if he knows. Of course, if he doesn't know—

MR. FOX: Q. When are these chutes drawn?

A. I couldn't just exactly tell. They draw them at all times of the day.

Q. They are liable to draw a chute at any minute, aren't they?

A. No, I wouldn't know.

Q. They might be drawing this chute the moment that he stepped on it, mightn't they?

MR. PLUMMER: I object to that as not cross examination.

MR. FOX: Oh—

MR. PLUMMER: Just a moment. Let me talk to the Court for a minute. That isn't the theory of our case as made by our complaint. Our theory is that they had drawn this chute, and the ore hung up, and he fell through it. What might be done some other time is wholly unimportant here. If they are asking this question for the purpose of showing that when he walked on this ore he might have known that it might be drawn from under his feet, that has nothing to do with the case. It is wholly immaterial as to what the custom was as to when they would draw this chute.

THE COURT: The objection is overruled.

MR. PLUMMER: An exception.

(Question read.)

A. Why certainly.

MR. FOX: Q. Now, Mr. Dalo, isn't it a fact that a mucker or miner who crosses or goes by one of those chutes must not cross the hole into the chute?

A. As long as you see the hole, yes, but this place here, there was a path right over it.

Q. Isn't it a fact that in wide places in that stope the chutes and the openings into the chutes in the floor were uniformly carried in the middle, but in narrow places like this they were uniformly carried on the hanging wall side?

A. Yes.

Q. That should be on the foot wall side. Ask him about the footwall side.

A. Yes, right alongside of the wall, so as to leave a pathway.

Q. I am asking him whether in a narrow place throughout the stope the openings into which he was mucking weren't uniformly carried on the footwall side?

MR. PLUMMER: He answered that.

MR. FOX: No, he didn't answer it. Ask him that question, whether he didn't know it to be a fact.

MR. PLUMMER: That isn't the question. That is two questions in one.

THE COURT: Yes.

MR. FOX: It amounts to the same thing. Ask him whether or not these openings weren't carried uniformly in narrow places in the stope on the footwall side.

A. No. This was in the middle.

Q. All right. This particular place was in the middle, was it?

A. The slide chute, the slide came to one side, and the hole exactly, he could not tell where it was.

Q. There was a slide there, was there?

A. Yes.

Q. And the slide was over to one side, was it?

A. Yes.

Q. Now then, isn't it a fact that these slides are built so that they point to the hole?

A. I coul not just exactly tell where it pointed, because it was covered with muck.

Q. On one side of the stope was a slide which extended from the floor above to the opening on this floor, didn't it, the opening into this chute?

A. Yes, but sometimes they would shift the slide to one side, so as to let the people go through.

Q. What is the object of this slide?

A. In order to draw down the ore.

Q. From the floor above?

A. Yes sir.

Q. And to let it down into this hole?

A. Yes sir.

Q. Now, then, he was walking from Number seven chute towards what manway?

A. Towards three or four.

Q. That would be on the other side of Number six chute, is that correct?

A. Yes.

Q. Now, on which side was this slide? Was it on the near side to him or on the far side to him?

A. I had to pass by the slide in order to get to ths manway to go down.

Q. Was it on the side he was coming from, or was it on the other side? He hadn't passed that slide yet, had he?

A. It would be to my left.

Q. It would be to his left. He hadn't passed the slide yet?

MR. PLUMMER: When he got hurt?

A. No sir.

MR. FOX: Q. Now, how was he going to get by that slide?

A. There was a lot of muck to one side and he had to go by this side.

Q. The left side?

A. This side, in order to go past the slide.

Q. He had to pass the slide on his left side, the way he was walking?

A. No, to my right.

Q. Ask him if he didn't say the left side first.

A. The slide would be to my left, but the passage-way was to my right.

Q. If he had stayed either to the right or to the left, instead of walking right in the center of the stope over this hole, would he have fallen into it?

MR. PLUMMER: We object to that as calling for the conclusion of the witness, and secondly, if he hadn't walked over it he wouldn't have fallen in.

MR. FOX: I will withdraw the question, counsel.

Q. I will ask him whether or not he could have passed safely by that opening if he had gone far to the right, that is, stayed on either wall.

A. I didn't know where the chute was, because the place was small.

Q. All right. Let him answer my question. If he had walked either to the right, along the right wall, or along the left wall, and not, as he did, right in the center of the stope, did he have room enough to go safely by this hole?

A. On the righthand side the muck was pretty high, and nobody could pass by there.

Q. And he expected to pass on the lefthand side, the slide chute on the left hand side?

A. I would go there and then cross over to the right side where the crossing was on the slide, the passageway of the slide.

MR. FOX: I think we can probably show this a little better if we bring that model in. Now, Mr. Dalo, isn't it a fact that the opening in a chute on a particular floor is never used more than four or five days before the work advances so far that these chutes ahead will have to be used, or that the chute is carried to the next floor?

MR. PLUMMER: I object to that.

(Question read.)

MR. PLUMMER: I will withdraw the objection.

MR. FOX: He said he walked over this place for fourteen days, if Your Honor please. What I am trying to elicit is whether or not, doesn't he actually know that these chutes are never used for more than four or five days.

THE COURT: Can't you put it in just that way?

MR. FOX: Q. Isn't it a fact, Mr. Dalo, that

these holes into which you muck are never used for more than four or five days at a time and sometimes they would be there for quite a while when they were not needed?

THE COURT: Do you need that model for cross examination? Can't you put it in later? I think it is going to take a good deal of time with this witness, where you have to interpret to him.

MR. FOX: I wanted to get at the condition there, if Your Honor please. Very well. I will use it later.

THE COURT: Perhaps counsel will have no objection to counsel explaining what that is.

MR. PLUMMER: I shall challenge the accuracy of it when I get to it, Your Honor. We claim that it doesn't even squint at the conditions there.

MR. FOX: I object to the remark of counsel, if Your Honor please. We shall contend on the other hand that the model is a correct representation, as near as can be made, of that stope.

MR. PLUMMER: That is where we disagree, counsel.

THE COURT: I suppose you would agree that it was illustrative. You may use it with this witness then. You may go ahead and have him identify it, if you wish.

MR. FOX: If there is no use, if it isn't admitted, we wouldn't get anywhere with it, if counsel is going to criticise the model, if Your Honor please.

MR. PLUMMER: We certainly are.

MR. FOX: That is your privilege.

Q. You say that this stope was six feet wide at this place, is that correct?

A. About six.

Q. About six feet wide?

A. Yes.

Q. Now, Mr. Dalo, your counsel has asked you in reference to an examination which two doctors made of you here in the hotel in Coeur d'Alene a few days ago. Did those two doctors ever examine you before that?

A. No, I had never seen them before.

Q. They just made that one examination of you, is that correct?

A. Yes sir.

Q. Is it not a fact that in April of last year, of this year, you went to Dr. Kerns in Spokane, the gentleman who made an affidavit in this case?

MR. PLUMMER: I don't know as he knows anything about the affidavit. If he does he can testify to it.

MR. FOX: Q. He did make an affidavit, didn't he?

A. I did go to Dr. Kerns.

Q. And you went to Dr. Kerns for quite a long time, didn't you?

A. At that time.

Q. You never told Dr. Kerns that you were suffering any trouble in your stomach here?

A. I thought it didn't amount to anything. I thought it was something that didn't amount to anything.

Q. And Dr. Kerns gave you a statement in writing as to what was the matter with you, didn't he?

MR. PLUMMMER: Just a moment. That isn't proper cross examination. If he has a statement he can identify it. The paper will speak for itself.

THE COURT: The question is preliminary only. I cannot anticipate just what it will lead to. The objection is overruled.

A. Yes.

Q. He gave you that writing?

A. Yes.

Q. You did not speak to Dr. Kerns about your trouble in your stomach because you didn't at that time have any, is that correct?

MR. PLUMMER: When was this, what time?

MR. FOX: In April of last year.

MR. FEATHERSTONE: This year.

MR. FOX: Of this year.

A. The only reason I didn't tell him nothing was because I didn't think it amounted to anything.

Q. You didn't have any trouble there at all, is that it?

A. Yes, I had a pain there, but I didn't think it amounted to anything.

Q. The first time that you called your hernia to the attention of the doctor was when your attorney again sent you to Dr. Kerns in November of this year, about November 20th, is that correct?

A. He examined me thoroughly and noticed it right away.

Q. How long had that condition existed? How long has that condition existed as it exists today, the hernia?

A. Since I fell down and then went to the hos-

pital. Afterwards I felt a pain, (indicating on the right side), and it has gradually shifted to the left side, and it is increasing from time to time.

Q. Isn't it a fact that this hernia which he now has he had long before this accident, and that when he came into the hospital he wore a truss for that purpose?

A. No, I did not.

Q. Ask him if Dr. Kerns is here or will be here to testify?

A. I don't know.

Q. Mr. Dalo, when you say that you saw other men walking across this place, where were you standing?

A. I would be with them, walking over it.

Q. Who were you with when you walked over it this day?

A. Right there when I fell, but the machine man had passed over the same place two minutes before.

Q. Where was he standing when the machine man went over that place?

A. I was near there placing water in my lamp to go and eat also.

Q. How close was he?

A. About twenty or twenty-five feet.

Q. You could see them from where you stood with your light?

A. Yes, I seen them when they passed over that chute.

MR. FOX: That is all.

RE-DIRECT EXAMINATION by
MR. PLUMMER:

Q. What wages were you earning when you got hurt, Mr. Dalo?

A. Four dollars and fifty cents.

Q. Speaking about Dr. Kerns, you say he examamined you the first time last April, was it?

A. Yes, Dr. Kerns at Spokane, in April.

Q. Did he say anything about discovering any hernia at that time?

MR. FOX: I object to what the doctor said about discovering a hernia.

MR. PLUMMER: They asked him that, and it wasn't proper cross-examination.

A. He only examined me from here up (indicating about the point of the stomach up).

MR. PLUMMER: Now, if Your Honor please, in view of the testimony that counsel has seen fit to bring out on cross-examination, we will give them permission to have Dr. Kerns testify in this case if they see fit. In other words, we will not take advantage of the statutory objection. They brought this in for the purpose of indicating that because we don't have him here there is some reason for it. We will give them permission to bring him here.

MR. FOX: We object to the statement of counsel. Dr. Kerns should be brought in by them. He is the man that knows more about this case than any other doctor.

MR. PLUMMER: I object to counsel arguing that.

MR. FOX: I reserve the right, if you don't bring him here, counsel, to argue that to the jury.

MR. PLUMMER: You certainly can.

THE COURT: Is that all with this witness?

MR. PLUMMER: That is all.

SAM MILLETTE, produced as a witness on behalf of the plaintiff, being first duly sworn, through the interpreter, testified as follows:

THE COURT: Do you speak English pretty well?

A. No, not very well.

THE COURT: Oh, pretty good.

A. Fairly good.

THE COURT: Let us try him.

DIRECT EXAMINATION by
MR. PLUMMER:

Q. What is your name?

A. Sam Millette.

Q. You are an Italian too, aren't you?

A. Yes sir.

Q. Did you ever work for the Morning mine?

A. Oh, yes.

Q. Were you working there when Mr. Dalo was hurt?

A. Yes sir.

Q. What was your duty, what was your business?

A. My business was chute man.

Q. Chute man?

A. Yes, sir.

Q. What does the chute man do with reference to drawing the ore, if anything, out of the chute?

A. The chute man, when the muck is tied up in the chute, and the muck man can't draw any muck, the chute man has got to go up and shake it down.

Q. When the ore is in the chute, before it is drawn out to load in the cars, who draws that out when it is drawn out?

A. The motor man, helper.

Q. The motor man's helper?

A. Yes.

MR. FOX: He said motor man and helper, didn't he?

MR. PLUMMER: Q. Who was the motor man's helper at that time?

A. His name was Tom, at that time.

Q. Who was the helper?

A. Tom.

Q. Tom was the helper?

A. Yes.

Q. What position did you hold at that time, what was your work?

A. Where I was at that time?

Q. Yes.

A. I don't remember. I used to be all over.

Q. Do you remember when this man got hurt?

A. Yes.

Q. What were doing that day?

A. That day?

Q. On the day that Dalo was hurt, what did you have to do, if anything, about drawing the chutes?

A. I don't know what you mean exactly.

Q. What did you do about drawing this chute,

Number six, that day, that morning, if anything?

MR. FOX: He had nothing to do with drawing the chute. He was the chute tender.

MR. PLUMMER: Let him do the testifying.

MR. FOX: I object to that kind of leading questions, if Your Honor please.

THE COURT: Mr. Plummer, I think if you will kindly stand or sit over here it will be better.

A. What I was doing that day? When Angelo Dalo was hurt? That Number seven chute?

Q. The chute he got hurt in.

A. I had heard from the motor man to go and shake up that chute, get the muck loose down so that he can draw the muck from the chute.

Q. Did you do that?

A. Yes, sir.

Q. What time of the morning was that that you did that?

A. Some time about half past eight, twenty minutes after eight.

Q. How did you do that? How did you get down in?

A. I knock it with a hammer.

Q. Against the chute?

A. Yes.

Q. By striking with a hammer?

A. Yes; sometimes I strike, and sometimes I use a bar, and so on, you see.

Q. And when you struck that with a hammer where were you?

A. On the fourth floor.

Q. How far down below where he was hurt were you when you were pounding with the hammer?

A. Something about five floors.

Q. Five floors?

A. Yes.

Q. Who was your boss that directed you about that work?

A. My boss was John Brown.

Q. How long before this time that you pounded on the chute, on account of the ore being hung up, how long before that had the chute been drawn, had the ore been taken out of the chute, that wasn't hung up?

A. You mean how long the chute was not used before?

Q. Well, maybe you don't understand me, or I don't understand you, I don't know which. Was there ore in this chute before the ore hung up? Was it full of ore at any time?

A. Yes; certainly it was full of ore.

Q. How long before you struck the hammer on there to loosen up the ore, how long before had the chute been drawn, the ore been taken out below that which was hung up?

A. Well, I would not say when the motor man draw from that chute.

Q. Do you know when it was taken out, approximately?

MR. FOX: He said he didn't see it.

MR. PLUMMER: Q. How long before that had you seen the ore up in that chute?

A. Now, I think, I have to say that I see the motor man draw from that chute,—I can't say so, because I did not see the motor man draw from that chute; I don't know whether he draw that morning or the day before.

Q. Did you see anybody draw from the chute before?

A. Some days I do and some days I don't, but that day I did not see him draw from the chute.

Q. What time of day was it that you tried to knock down from that chute?

A. Thirty minutes after eight.

Q. Was that on the stope floor where he got hurt that morning?

A. I went to the stope but very seldom.

Q. I say on that morning?

A. I wasn't on the stope that morning. I was up in the stope when the man was in. I went in the stope to try and give some help.

Q. Then when you pounded on the chute with your hammer four floors below to try to loosen up this ore that was hung up, you don't know how much of it came down or how much still hung up, do you?

A. Yes, because I went through the top, in the top, the chute, and found out whether the chute is clear empty or not, because I want to know if the chute is loose, but now take the question of the chute, you can't say, because it is covered up. That floor got to be covered up, so I can't see what goes on top. I found out that the chute was clear emqty. I mean I knocked the muck down.

Q. You couldn't tell what was on top, on that level?

A. No, sir.

MR. PLUMMER: Does the Court understand him?

THE COURT: Yes, I think so.

MR. PLUMMER: He was on the floor below, he says. I think that is all.

MR. FOX: There won't be any dispute, I take it, counsel, that the model doesn't represent a chute coming up through?

MR. PLUMMER: I presume that is about the way a chute is built; I think so.

MR. FOX: The discrepancy occurs in the way the conditions are shown upon the floor.

MR. PLUMMER: There may be others that I don't now anticipate, but so far as the chute itself, I think that is substantially correct.

CROSS-EXAMINATION by

MR. FOX:

Q. There is a manway leading up alongside of the chutes, isn't there? You say, Mr. Millette, that the top of the manway, that is, on the floor on which the opening into the manway is, is always covered alongside of a chute?

A. On top, that Number seven chute?

Q. No, the manway at the chute at which he was hurt, that is covered up, isn't it?

A. The manway was clear yet.

Q. Could you go clear through it to the floor on which he was working?

A. No, not to see the hole.

MR. PLUMMER: I object to this as not proper cross-examination. I object as not cross-examination. I haven't asked him anything about the manways or how he would get to this place or that place.

THE COURT: Sustained.

MR. FOX: Pardon me. I don't want to argue after Your Honor sustains an objection, but I don't think Your Honor understood the testimony of this witness. He said on direct examination that the manway was closed. I want to show that the manway alongside of the chute is always closed. He made that statement.

THE COURT: If he made the statement, you may ask it.

MR. PLUMMER: I couldn't anticipate it, if he did make the statement.

MR. FOX: Q. Why was the top of that manway covered up that day?

MR. PLUMMER: We object as irrelevant and immaterial.

THE COURT: Do you want his answer stricken out that the manway was closed?

MR. PLUMMER: I do.

THE COURT: That may be stricken out then. I didn't hear that. It won't hurt you any.

MR. FOX: Q. The chute tender never goes up to the floor where the men are mucking down, for the purpose of finding out whether or not the chute has hung up over the hole?

A. No, sir.

Q. Who clears that hole off when it is hung up?

A. Who clears that hole off when it hang up?

Q. Yes.

A. Very seldom. Most of the time when I muck down a chute it slide in; very seldom that it pile up on top like that. And it was not my job to go up on top, because I can't go through from that manway there.

Q. It wasn't your business to go and do that?

A. No, sir.

Q. Whose business was it?

A. Well, I don't know whose business it was. That must be the company—

Q. Never mind.

MR. FOX: I move that that be stricken out.

Q. You don't know whose business it was? How did you say you knocked down these chutes,—with a hammer?

A. Yes, sir.

Q. You simply knocked on the sides of the chute?

A. Yes, sir.

Q. Now then, when the chute is drawn it makes an awful lot of noise, doesn't it?

A. Well, sometimes, and sometimes not.

Q. Did it make a lot of noise that morning?

A. Not very much, because it is fine stuff. In some chutes there is big stuff in, and when it slide down it make a lot of noise, but that chute, I remember exactly, don't make much noise; it slide down very smoothly.

Q. How many floors on that stope were hung up?

A. Four floors. I found it hung up on the fourth floor.

Q. It hung up from the fourth floor to the top?

A. From the fourth floor to the top it was filled up.

Q. And when you knocked on it the first time the whole thing came down, is that it?

A. Yes, sometimes it drop down in clear from the top, but that chute it slide down very good.

Q. How do you remember it was eight thirty in the morning when you did that?

A. How do I remember the chute was cleared down, you mean?

Q. How do you fix the time? You said this was thirty minutes after eight.

A. Well, I said about that.

Q. It might have been an hour later?

A. Well, no; something between thirty minutes after eight to something close to nine o'clock.

Q. You wouldn't want the jury to understand that you positively testified that it might not have been after nine o'clock?

A. It is pretty hard—I have not my watch in my hand, but I remember it was about half past eight to close to nine o'clock.

Q. It might have been half past nine, mightn't it?

A. No, not so late.

MR. FOX: That is all.

RE-DIRECT EXAMINATION by
MR. PLUMMER:

Q. State whether or not if you had been ordered by Mr. Brown to go up onto this stope floor and loosen up the balance of that ore, if it would have been your duty to do it?

MR. FOX: I object to that as not proper. It is merely hypothetical.

THE COURT: Let him finish the question. Don't answer, witness, until I tell you to.

MR. PLUMMER: I think I have it all there.

THE COURT: Read the question, Mr. Reporter.

(Question read.)

MR. FOX: I object to it. It is absolutely incompetent, if Your Honor please.

THE COURT: Sustained.

MR. PLUMMER: On the ground that it is incompetent?

MR. FOX: It doesn't go to any issue in the case.

THE COURT: It is a hypothetical question, Mr. Plummer.

MR. PLUMMER: I will change the form of it.

Q. I believe you said Mr. Brown was your boss, shift boss on that level?

A. Yes, sir.

THE COURT: I thought Mr. Brown was superintendent or foreman.

MR. PLUMMER: He is now.

MR. FOX: He is foreman now. He had charge of this shift then.

MR. PLUMMER: Q. Who did you obey in doing your work?

MR. FOX: I think that—

THE COURT: That is conceded, is it?

MR. FOX: Of course. Somebody must be in charge.

MR. PLUMMER: All right then. That is all I want to get at.

MR. FOX: Somebody must be in charge.

MR. PLUMMER: Sure.

Q. When the chute is filled with ore—

A. Yes, sir.

Q. How do they get it out down below in the cars, or whatever they take it out with?

A. Open the gate and the muck come out.

Q. When that ore is let out, state whether or not it runs out slowly or gradually.

A. Well, some places it is slow, it depends on the kind of ore that is in the chute.

Q. I mean the top of it. How would the top sink, quick, like that, or slowly, like that,—that is what I want to get at.

A. Well, the top—

Q. When you are drawing it out of this gate, I mean.

A. Yes,—it drop down, it drop down, it drop down, slide down.

Q. But I am trying to get at whether it—oh, I will withdraw the question.

WITNESS: Maybe I don't understand you.

MR. PLUMMER: That is all right. I think it is a matter of common knowledge. That is all.

MR. FOX: That is all.

LEONARD E. HANSEN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. PLUMMER:

Q. You are a physician and surgeon practicing in Wallace, are you?

A. Yes sir.

Q. And you are the company doctor there, of the Federal Company?

A. One of them, yes.

Q. Did you examine the plaintiff, Mr. Dalo, on account of the injuries that he received, that he has testified about this morning? You have heard his testimony, haven't you?

A. Yes, I did.

Q. Just state what condition you found him in when he was brought to your hospital.

A. He had a dislocation of the joint which is formed by the collar bone and the shoulder blade. The collar bone was pushed upward and stuck up about an inch above where it should stick up. He had two fractured ribs, the ninth and tenth ribs, I believe, on the right side, and some abrasions, that is, his right leg was skinned from the knee down in several places.

Q. How long did he remain under your care, doctor?

A. He was in the hospital from the 13th of January to the 27th, and I saw him for about two months after that, off and on.

Q. Do you recall the date when he was first brought to your hospital?

A. I think it was the 13th of January.

Q. That is last January?

A. Yes, this year.

Q. Nearly eleven months ago now. And the last time you saw him was when,—I mean to examine him physically?

A. I haven't the data on that. He came at regular intervals. It must have been about the first of April.

Q. What was the condition of his left arm, with reference to his ability to raise it?

A. He had about three-fourths of the motion or extension at that time, maybe four-fifths.

Q. With reference to his hand and closing his fingers, what did you notice then, the last time you saw him?

A. Well, at that time he was not able to close his hand completely, but it had shown some improvement.

Q. You mean it had shown some improvement from what it had been previously?

A. From the time it came out of the cast.

Q. You had it in a cast, did you? His shoulder?

A. It was either a cast or a Velpeau bandage; sometimes we use one and sometimes the other.

MR. PLUMMER: That is all.

CROSS-EXAMINATION by
MR. FOX:

Q. What do you mean that he had at that time,

as I understand it, in April, regained between two-thirds and four-fifths of his extension? How high could he raise his arm then?

A. Well, he had his arm about level with the shoulder.

Q. Could he raise it any higher at that time?

A. No.

Q. What is that due to, doctor?

MR. PLUMMER: Now, just a moment. If Your Honor please, I didn't ask him about that. I have only put the doctor on to show certain conditions there as a basis for a hypothetical question to be put to the other doctors, and there is a showing that he is the company doctor, and while I think he is perfectly honest, I don't want to be bound by his statement.

MR. FOX: Of course, company doctor is an erroneous appellation.

THE COURT: Read the last question, Mr. Reporter.

(Question read.)

MR. PLUMMER: I never asked him anything about causes, or anything of the kind.

THE COURT: I think I shall sustain the objection.

MR. FOX: Q. Doctor, how about this proposition of company doctor. Just explain to the jury how the men happen to come to you.

A. Well, the men in most of the mines have the choice of the physician and the hospital that they want. For instance, a man working in the Morning mine has the choice of—

THE COURT: That is, a man such as the plaintiff here was, you mean?

A. Yes.

THE COURT: Take this man as an illustration, at that time. What were his choices, if he had any?

A. He had a choice of two hospitals, one of two hospitals, the Wallace Hospital or the Providence Hospital.

MR. FOX: Q. Those are the only two hospitals in that community?

A. Yes. He had a choice of—I will have to figure that up.

Q. Just name the doctors as you think of them.

A. I will get them in just a minute. In this particular mine, or any of them, they would have a choice of seven or eight physicians.

Q. And, Doctor, are these hospitals owned by the mining companies, or any mining companies?

A. The Providence Hospital is owned by the Sisters of Charity.

Q. And your hospital is owned by yourself and Dr. Smith?

A. The Wallace Hospital is owned by Dr. Smith and myself.

Q. Are you paid a salary by these mining companies?

A. No.

Q. Simply a fund is made by taking a dollar a month from the wages, and that is distributed among the doctors?

A. A dollar and a quarter a month.

Q. And that is the reason why, in these cases, the attorneys called you the company doctor?

MR. PLUMMER: Well, I object to that. This is the first case I have tried here.

THE COURT: Now, gentlemen, I assume that the jury are sensible men, and are not going to be influenced by these statements and retorts of counsel. I don't remember that the doctor stated that he was the company doctor. He explained before, and his explanation was substantially the same as it is now. Whether he should be called as a company doctor or not is wholly unimportant. The facts are there, gentlemen, and you may consider them in passing upon the credibility of this witness.

MR. FOX: Yes.

Q. Did he complain to you, Doctor, of any other injuries than that which you have detailed?

MR. PLUMMER: Just a moment. We object to that as not cross-examination. What I have reference to is this.

THE COURT: You mean at the time he was under his care?

MR. FOX: Yes, at the time he was under his care.

Q. From the time he came in on the 13th or 14th of January until he left your care, Doctor?

THE COURT: You have asked him how he was injured.

MR. PLUMMER: No, I have asked him what he discovered by way of injuries by reason of this falling.

THE COURT: Isn't it well known that the doctor always takes into consideration the complaints of a man in making a diagnosis of his case?

MR. PLUMMER: Probably he does, but I am anticipating that counsel might try to prove by this doctor that the man had some form of a truss on, and I wouldn't want to be bound by his answer.

THE COURT: That is a bridge that we haven't reached yet.

MR. PLUMMER: But I have got to anticipate it.

THE COURT: You may answer the question.

A. He did not.

MR. FOX: Q. I will ask you whether at that time the plaintiff was suffering from a hernia?

MR. PLUMMER: We object to that as not cross-examination, and irrelevant at this time, and not proper, and we don't want to be bound by his answer, because we have a right to dispute that. I asked him nothing about a hernia at all.

MR. FOX: Counsel is going to make out that the doctor testified that he was injured only in this way, excluding the existence of hernia at that time.

MR. PLUMMER: The doctor has testified that he made no complaint of any other trouble.

THE COURT: The objection is overruled.

MR. PLUMMER: An exception.

(Question read.)

A. My opinion is that he was at that time.

MR. FOX: Q. Do you remember, Doctor, whether or not he wore a truss at the time he came into the hospital?

MR. PLUMMER: We object to that as not cross-examination.

THE COURT: Overruled.

MR. PLUMMER: An exception.

A. My impression is that at the time he was put to bed he took off a truss.

MR. FOX: That is all.

RE-DIRECT EXAMINATION by
MR. PLUMMER:

Q. You are not sure about that, are you doctor?

A. I am not absolutely sure about it.

Q. Either I didn't quite understand your answer, or else Doctor Kimball didn't. Was there a fracture of the collar bone? What was the condition of the collar bone?

A. I made X-ray plates of him the day he came in, and at that time the X-ray plates showed an old healed fracture of the clavicle. It was not fractured at the time, but had been fractured.

Q. What was the condition which appeared to have been caused by this recent accident, is what I am trying to get at, this accident he had there in the mine? What was the conditions there of the shoulder and the collar bone?

A. The dislocation of the joint formed by the collar bone and the acromion process of the scapula; that is where the collar bone runs out and inserts into a part of the shoulder blade; and this collar bone was pushed up. It is a sort of a flat joint; it isn't really a true joint, and the joint surface of the bone was pushed out of place.

Q. When did you take the X-ray, doctor?

A. I think they were taken shortly after he came in.

Q. Have you got them with you?

MR. FOX: I have it, counsel.

MR. PLUMMER: What are you doing with them?

MR. FOX: I asked them of the doctor.

MR. PLUMMER: Is it broken?

MR. FOX: The part that—

MR. PLUMMER: You had better let the doctor pick it out.

MR. FOX: I will let the doctor pick it out. That shows it.

MR. PLUMMER: You are picking it out for him.

MR. FOX: All right. That is the only X-ray plate I have that shows the shoulder, that the doctor took. We have some others.

WITNESS: Yes, this is it. You have to put a light back of that.

MR. PLUMMER: Yes. Where is the break?

A. I think the old callous is about in the middle.

Q. Anyhow it showed that at some previous time there had been a fracture on the collar bone, didn't it?

A. Yes.

MR. FOX: Do you want to see these, Mr. Plummer? These were the ones taken the other evening.

MR. PLUMMER: I can't tell anything about them. The more I look at them the more puzzled I get. That is all.

RECROSS-EXAMINATION by
MR. FOX:

Q. Doctor, you say that the plate showed the old break, is that correct?

A. I say that it showed an old break. It showed an enlargement of the bone, and I presumed, of course, that it was either an old break or an old injury to the bone.

Q. And whereabouts was that?

A. That was about the juncture of the outer and the middle thirds.

Q. What the ordinary person would say, about in the middle?

A. No. The collar bone is divided anatomically into three parts; the inner third and the outer third divides the bone into three parts. It is the junction of the middle third with the outer third, gives you about the junction of the outer and middle thirds.

Q. Doctor, was there a reduction or a putting back into place permanently of the bone, the collar bone, after this injury?

MR. PLUMMER: Just a moment. What is that question?

(Question read.)

MR. PLUMMER: I didn't examine him on that question at all, Your Honor. As I say, I don't want to be bound by answers that I haven't asked him about.

MR. FOX: You asked him about what the injury was, and then you leave the doctor. You asked him first what he did to correct that injury, and then you leave him without asking what the result was.

MR. PLUMMER: I will withdraw the objection. Go ahead.

MR. FOX: Q. Was there a permanent reduction and putting in place of that collar bone, doctor?

A. Well—

Q. If you know?

A. I wouldn't want to say that it was permanently reduced to where it was before the accident, but the last time I saw him he had a very good result, that is, the thing was not noticeable from the outside.

Q. What I am trying to get at is, whether or not there is now there a bone injury as a result of that accident?

A. No, I don't think there is any bone injury at all.

Q. Or whether there is now a dislocation, as a result of that accident?

A. There was no dislocation the last time I saw it.

MR. FOX: That is all.

MR. PLUMMER: That is all.

E. L. KIMBALL, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. PLUMMER:

Q. Please state your name.

A. Dr. E. L. Kimball.

Q. Where do you reside?

A. Spokane.

Q. What is your business or profession?

A. Practicing medicine and surgery.

Q. How long have you been engaged in that profession?

A. Over forty years.

Q. And you are still engaged in that profession in Spokane now?

A. Yes.

Q. I will ask you, Doctor, whether or not during the time you were here in another case, day before yesterday, at my request and in the room which I had at the Idaho Hotel that day, you examined the plaintiff in this case, Mr. Dalo, this gentleman sitting over here?

A. Yes sir.

Q. Who examined him with you, what physician?

A. Dr. Rohrer. We were here on that other case.

Q. And preparatory to this examination, what did you have the plaintiff do by way of removing his clothing?

A. Completely strip.

Q. Where did you place him then after you had him stripped?

A. Well, sitting, standing on the floor, and standing up in a chair.

MR. PLUMMER: I may want to ask the doctor some hypothetical questions. I think I will have to recall him in just a moment when I ask the plaintiff one question, which will be the basis of the hypothesis.

THE COURT: Perhaps you can ask him right there.

MR. PLUMMER: I can.

ANGELO DALO, heretofore duly sworn on behalf of the plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. PLUMMER:

Q. Mr. Dalo, did you ever, before this accident in the mine that you speak of, did you ever have any other accident to your shoulder or your collar bone, or anything around that vicinity?

A. No, sir, never.

Q. Did you ever wear a truss at any time?

A. No, sir.

MR. PLUMMER: That is all.

CROSS-EXAMINATION by
MR. FOX:

Q. Mr. Dalo, have you got that letter from—that statement from Dr. Kerns?

A. I don't know whether I have or not.

Q. See if you have.

MR. PLUMMER: I think I shall object to that anyway. That isn't cross-examination. Call Dr. Kerns, if you want to.

MR. FOX: Q. Isn't it a fact, Mr. Dalo, that Dr. Kerns told you that whatever you were suffering from now was the result of a fracture of this clavicle bone?

MR. PLUMMER: We object to that as not cross-examination, and calling for hearsay testimony as

to what somebody told him, and it is wholly immaterial.

THE COURT: Sustained.

MR. FOX: That is all.

E. L. KIMBALL, heretofore duly sworn on behalf of the plaintiff, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. PLUMMER:

Q. Doctor, just go ahead now and tell the court and jury just what examination you made, what different parts of the body and what you discovered as a result of that examination. Just tell it in your own language, and in your own way, so that they will understand, of course.

A. My first look at the man, or part of my examination, was to see how his body compared one side with the other, and whether there was any wasting or change in the arm which could be seen or discovered by the examination, and the result of that was that I could see no difference, and, measuring with a tape, could discover no difference in the size of the right and the left arm. It seemed a little softer in the left arm, but I couldn't say that that was a real condition, but the size was the same. Moving the arm was free, except in the act of raising it out straight, and he began to complain of severe pain out on the point of the shoulder when we began to push it above what I would say was a level condition, with the floor.

Q. Horizontal, I suppose you mean, doctor?

A. Yes, sir. And any efforts to push it up above there brought out such pain that we had to stop.

Q. How was the pain manifested, from objective symptoms?

A. Well, he would grasp the part with his other hand and beg us to stop. I couldn't get it any higher. His hand showed what we call a contracture. The fingers could be kept out straight and put out straight, and he could bring them in about in the position which I have got my fingers in now, perhaps a little more than half way into a clinched position, he couldn't clinch them or he couldn't get them, or he didn't, or he couldn't, any further than that. The thumb had pretty good movement, and he could get his thumb against that finger without bending it more than that to do some little things. I noticed him buttoning and unbuttoning his pants, that he held the fingers in somewhat that position (indicating), and helping his right hand with his left. I observed that as he was dressing and undressing, and I might say, I asked him about holding, whether he could feed himself, and he said he could get his fork in there a little, sometimes he could hold it a little, but he couldn't do much.

Q. When you say there, doctor, you mean between the thumb and the forefinger?

A. Between the thumb and the first finger, but he said if he got the thumb up in here he couldn't get it tight enough to hold it—I am repeating this—I don't know whether it is proper.

Q. Well, they are not objecting to it.

A. That his wife cut his meat for him. That contracture existed on his hand. He shows what we call a rupture, a left inguinal hernia; that is, some of the contents of his belly have gone down into his scrotum, and there is a hernia increasing the size of the scrotum to perhaps not quite my two fists, but double the normal size when just the testicle alone is there. Then the sensation of—

Q. Before I get to that, Doctor, I want to cover this one point about the hernia first. I think you have described, Doctor, so that we fairly well understand what a hernia is, but I wish you would state more particularly what a hernia is.

A. Well, a hernia is the pushing out of the wall of any cavity of the body by the contents that are behind it. You can have hernias, as we use the term scientifically, of the brain, and of the contents of the belly, up into the chest, and so on, anywhere where there is a cavity, and something may push its contents out of their normal place and into some other region, we speak of it as a hernia. I meant to say, Mr. Plummer, that examining the right side by pushing a finger up into what is called the canal, the inguinal canal, we could feel a little bulging up in there, not marked enough to see upon the surface, but enough to strike upon the end of the finger when he coughed or strained, what we term the beginning of a rupture upon that right side. Now, there are quite a number of hernias in the belly wall, if you wish me to describe this one—

Q. You can describe this one, Doctor, if there is anything you haven't covered.

A. I won't unless you wish me to.

Q. This particular hernia you can make any description of it that you wish here, and I would like to have you do it.

A. I don't understand exactly what you want.

Q. If there is anything about this particular hernia that you haven't already illustrated or told the jury, Doctor, I wish you would tell them.

A. Well, it is a sort of a natural passage that these hernias, such as this man has, that exist, and there is a little path there where these things come down, and while it is closed normally in most of us, to some, by some strain, the contents of the belly start and they work down this channel, which begins perhaps about two or three inches from where it comes out here; it goes up through the walls of the belly between different layers, and then goes up into the abdominal cavity, and we call this place where it comes out the external ring, that is, where it comes to the surface, and the place which is up here where it starts, because it is down underneath, we call that the internal ring, and we can take our finger, any man, and he can follow up the cord that comes up from his testicle, and he can feel clear up in there, and it is in that channel down which this rupture comes and did come in this case.

Doctor, take a man fifty-three years old, who has always been a man carrying on manual labor, never having any injury or trouble or inability to work, and he is injured by falling down an ore chute a distance of between twenty and thirty feet, by rea-

son of being precipitated down there suddenly, when he don't expect it, and a few months afterwards this hernia develops, state what is the usual cause of this class of hernia—I will change the form of that—state whether or not in your opinion, this injury which I have described, or accident, produced that hernia at that time?

MR. FOX: I don't think that is a fair question, Your Honor. This doctor certainly cannot guess at any such proposition as that.

MR. PLUMMER: I will change the form of it. Let us argue the case later. I will change the form of it.

Q. Doctor, could a hernia be produced by that sort of an accident?

MR. FOX: I object to that as simply a possibility, if Your Honor please. We must deal with probable results at the very least, if Your Honor please.

THE COURT: Sustained.

MR. PLUMMER: Q. What, in your opinion, Doctor, is the reasonable probability of this hernia having been produced by the accident which I have described?

MR. FOX: I don't think the doctor can answer that question.

MR. PLUMMER: He certainly can answer any question in medical science.

THE COURT: I think I will let him answer, with this caution, doctor, if you can answer this question, bearing in mind now that it relates to this particular hernia; you aren't to answer a question

as to whether or not such a hernia may have been the result, or could have been the result, of an accident, but did this hernia come from this accident.

MR. PLUMMER: Q. In your opinion, I asked?

A. Well, I feel that I ought to be protected in my answer by all the information relative to the case, Mr. Plummer. I don't want to get into the quandary that Mr. Fox speaks of.

Q. All right. I will relate the other circumstances then. I think I can make it briefer if I can refer to what the doctor testified and what the plaintiff said as being the basis of the hypothesis. Did you hear the testimony of Dr. Hansen?

A. Yes.

Q. And the testimony of the plaintiff about the accident?

A. Yes.

Q. State then, whether or not, Doctor, in your opinion, if this man fell down this chute as he described, and from which he received a fractured collar bone and a dislocation of the left shoulder, that two ribs were broken off the right side, from that kind of a fall and shock incident to it, whether or not in your opinion that accident did or did not cause the hernia which you have found in this man.

MR. FOX: I object to that question, if Your Honor please, for the same reason. That doesn't take all the hypothetical facts into consideration. Counsel asked him first, did you hear Dr. Hansen testify, and the doctor said that unless the entire hypothesize, the entire hypothetical facts are stated,

he cannot give an answer to it, I think we are entitled to have all the hypothetical facts upon the basis of which the doctor is going to answer that question stated, so that we will have an opportunity to cross-examine him on it.

MR. PLUMMER: I have stated all that I can think of.

THE COURT: You mean to say, assuming that the testimony of the plaintiff and the testimony of Dr. Hansen is true?

MR. PLUMMER: Yes, of course.

MR. FOX: And based upon his examination?

THE COURT: Assuming that that testimony is true, and that you haven't any other facts, except such as you have learned from the examination of the plaintiff, can you intelligently answer as to whether or not the hernia was probably the result of the fall?

WITNESS: Well, I would like to ask the Court if I can frame the answer perhaps to make myself clear.

THE COURT: No. You will simply have to answer that yes or no.

MR. PLUMMER: I think, if Your Honor please, if he answers yes or no, he can make such explanation of his answer as he wants to.

THE COURT: We will see what the explanation is. You have asked him whether in all probabilities, or whether in probability one thing is the result of the other.

MR. PLUMMER: Yes.

THE COURT: Now, that question is susceptible of only one of two possible answers. It is either yes or no.

MR. PLUMMER: Q. Doctor, state what your opinion is about that.

THE COURT: Or, of course, he can state that he hasn't facts enough upon which to base an intelligent opinion.

WITNESS: That is what I meant. I was going to put that in my answer to Mr. Plummer's question, that I wanted to know if there had ever been any signs of a hernia before the injury.

THE COURT: But you cannot know that, because there isn't any evidence upon that point. Your answer is that you cannot intelligently answer in the way that it has been given.

A. Not in the way that it has been put to me. It seems it hasn't been, but it could be.

MR. FOX: I don't think it is necessary for the witness to instruct the counsel.

MR. PLUMMER: We want to get the facts here. I would like to add to my question this, that the patient had never to his knowledge been troubled with a hernia before, and had not worn a truss, and had not been physically disabled in any way before.

WITNESS: And had not been hurt during the interim?

Q. And had not been hurt since the accident I speak of.

A. I should say then that it is well nigh abso-

lutely probable that the hernia started from the injury.

Q. And, doctor, assuming that the hernia did not appear so that you could see it, and that while say during the first fifteen days he felt some little pain in that region, but not of very much moment, I wish you would explain how it would develop, or what would cause it to develop later into the hernia that now shows.

A. Hernias develop sometimes very slowly, sometimes they are months in their development. In these days we take them at their first signs, but sometimes they come down very slowly, and every little exertion or coughing or straining at stool passes it a little further. Sometimes it takes weeks or months before the hernia is complete, when it comes outside of the body, outside of the abdominal wall, down into the scrotum.

Q. What are the usual and most frequent causes of a hernia? I direct your attention—I won't direct your attention at all. I just ask you that. What I want to get at is whether disease, or whether force, or whether strains, or what.

A. It is not a disease, in the sense in which we use the term, but the causes are any strain upon the abdominal contents that forces them against the wall and forces them out of this weakened place, which is the beginning of a hernia.

Q. Doctor, in your examination of the patient at the time that I speak of, assisted by Dr. Rhorer, just tell the Court and jury what you and Dr. Rohrer

did by way of testing the condition of his nerves, his nervous condition. Just describe that, and the results you obtained from that.

A. Well, we tested pretty thoroughly the condition of his nerves on both sides of his body. He showed in the first place a complete paralysis of sensation on the left side of his body from the crown of his head to the toes. I didn't test the inside of his mouth. That didn't happen to occur to me. But we went clear on down, with the pricks of a pin, and pushing a pin into his skin, and it so happened that we took heat—would light a match, and go as far as we dared to, without actually burning his skin, without the slightest—and we had him blindfolded, and he seemed to show no feeling whatever. And another thing what we call the superficial reflexes, skin reflexes, that is, you take and draw a pencil or some object over one side of his belly and all the muscles involuntarily twitch, it is beyond his control, the same as when you tickle a man's feet he will jump, and in this man, by drawing these pencils and things over his body on one side there was no response, and on the other side generally a response, —not every time, but most of the reflexes showed some on the right side. The deep one at the knee-cap didn't show to me hardly at all on either side. The contraction of the foot seemed to show a little on the left side as well as the right. No indications, I might say, in this case, of any spinal cord disease whatever in any of the symptoms that we brought out. And there is none in his case either.

Q. Doctor, while making these tests and while Dr. Rohrer was sticking pins into his back and the back part of his legs, and the back part of his neck, and the back part of his head on the left side of the whole body, state whether or not you engaged him in conversation so as to draw his attention away from what Dr. Rohrer was doing?

A. Yes.

Q. Just describe the test you made.

A. The responses were quick on the right side, and none upon his left. Any time when we would be pricking him, and would go over to the other side, then he would start very quickly.

MR. PLUMMER: Have you got the pin you used, Dr. Hansen?

WITNESS: It was a scarf pin like the one I have got on.

THE COURT: Gentlemen, I shall have to caution you to limit the testimony of these physician witnesses. It is really taking too much time.

MR. PLUMMER: I am going just as fast as I can. I have only asked about twenty questions.

THE COURT: It is taking a long time to ask twenty questions.

MR. PLUMMER: Q. I show you this pin, and ask you to state whether or not that is the pin you used?

A. Yes, I think that is the one; it looks like it.

Q. It shows to be a pin about two inches and a half long, does it?

MR. FOX: I don't suppose the doctor stuck that in two and a half inches, did he?

MR. PLUMMER: Oh, no.

THE COURT: Suppose it was only stuck in an eighth of an inch.

MR. PLUMMER: It would only show the diameter of it.

THE COURT: Then perhaps you had better put in the record the diameter.

MR. PLUMMER: Well, I haven't a rule small enough.

THE COURT: That seems to be the only material thing.

MR. PLUMMER: Q. Doctor, to what do you attribute, assuming the testimony that the plaintiff testified to is correct, and the condition that Dr. Hansen found when he examined him immediately after the injury, assuming that he had never had any trouble before this accident, what do you attribute his inability to raise the arm any higher than you say he appeared to be able to raise it, and also the pains, and the condition of his fingers, and his inability to close his hand any greater than you say he was able to close it?

A. That condition of the shoulder, I think, is due, could be due, is probably due to the injury he received there, and that it was left in a—that is, that in the recovery there there is commonly adhesions, and the parts are sore and easily hurt by excessive movement. That is what I attribute most of it to.

Q. In case of a dislocation of the shoulder, Doc-

tor, and a fracture of the collar bone, what does that produce upon the muscles and ligaments of the shoulder?

MR. FOX: If Your honor please, I don't think the witness could answer that intelligently.

MR. PLUMMER: I don't see why he couldn't.

THE COURT: He assumes that the same conditions are produced from every injury to the bone.

(Question read.)

MR. PLUMMER: Ordinarily.

MR. FOX: It hasn't been shown that there was a fracture of the collar bone. As a matter of fact, Dr. Hansen testified that there wasn't a fracture.

MR. PLUMMER: Dr. Hansen didn't so testify. He said he saw a fracture that, but he thought it was an old one, and the plaintiff testified that he never had any other injury.

THE COURT: I understood Dr. Hansen not to say that he thought it was an old one, but that he thought—

MR. PLUMMER: Very well. I would like to have his testimony read.

THE COURT: Very well.

MR. FOX: And it wasn't a dislocation of his shoulder; it was simply a dislocation of the collar bone.

MR. PLUMMER: I will change it then to collar bone, if counsel says that.

THE COURT: I understood him to say that there was a recent dislocation, but he said the fracture was an old one.

MR. PLUMMER: I think he said that it appeared to be an old fracture.

THE COURT: Mr. Reporter, you may turn to his answer, unless counsel for the defendant is of the same opinion as counsel for the plaintiff, as to what he testified to.

MR. FOX: Oh no, it is an old fracture.

THE COURT: Turn to it then, Mr. Reporter.

(The reporter thereupon read such portions of Dr. Hansen's testimony.)

THE COURT: I don't think the testimony can be construed as a statement by the doctor that at the time he examined this man there was a fracture of the bone there, because it was an old break there or nothing, he said there was an enlargement of the bone.

MR. PLUMMER: Of course, that is where the doctor and the plaintiff will disagree.

THE COURT: All that the doctor states as a matter of fact that he found there was an enlargement of the bone. The rest of it is opinion as to whether that is due to some injury or a break, but very clearly the inference couldn't be drawn from that testimony that it was fractured at the time he looked at it.

MR. PLUMMER: If that is the view the Court takes of it, then I will limit the question to dislocation of the collar bone, and ask the doctor what effect that usually produces upon the ligaments or muscles in that region.

MR. FOX: In this particular case?

MR. PLUMMER: He didn't see this man when he was hurt. I must get it hypothetically.

THE COURT: Taking the description of Dr. Hansen as to what he found there?

MR. PLUMMER: Yes, just take that.

A. Taking Dr. Hansen's description, that the bone was raised an inch and a half from the shoulder, the point of the shoulder, shows that everything that did unite or hold those bones together—it is not like—it is not a joint, in the sense in which we use the term; there is no cavity there; but the bones are tied together by these ligaments; and the distance that the doctor says they were apart shows that they were all torn and ruptured in that occurrence, and it is very very difficult to get a union of such joints again. The ligaments—ligaments don't repair themselves, and consequently we get more or less looseness there and painful conditions.

Q. Doctor, would that condition of that ligament and any effect which it might have upon the muscles, if any, account for his inability to raise the arm any further than he says he can raise it?

A. That is what I said.

Q. Assuming, doctor, that that injury happened eleven months ago, considering his age, 53, state what is your opinion with reference to whether in all reasonable probability he will or will not recover from that condition, both as to the fingers and the condition of the arm, and his inability to raise it in the way I have described.

A. The condition of the fingers and the condition

of the arm are altogether two different things, and different causes. That condition of the shoulder will be weakened, I should say, positively, forever, not useless, but weakened, not having the strength and ability to do things with it that he could have. The condition of the hand I think is another matter.

Q. To what do you attribute that, and also this condition of no sensation that you found on the left side of the body from the head to the feet?

A. That condition, that paralysis of his feeling sensation, and that contracture of his fingers there, in my judgment, are purely hysterical.

Q. And what sort of hysteria is it, doctor, I mean traumatic, or otherwise?

MR. FOX: If the doctor can state.

MR. PLUMMER: If he can state, yes.

A. I certainly consider it a traumatic type. Traumatic hysteria is no different from any other hysteria. We only use the term to signify its cause, that is all. I should say this was caused by traumatism or injury to start with.

Q. I wish you would describe to the Court and jury just the effect trauma has upon a person, and have them understand the result from the trauma in this man that you found. Do you understand my question, doctor?

THE COURT: I think you have gone far enough with that, Mr. Plummer.

MR. PLUMMER: All right.

THE COURT: He has expressed his opinion.

MR. PLUMMER: Q. Doctor, state whether or

not a person of the age of the plaintiff, whether or not his recuperative powers are or are not lessened on account of his age, his recuperative powers to recover from an injury?

MR. FOX: That varies in different individuals.

MR. PLUMMER: I am speaking of the appearance of this man, his age.

MR. FOX: I don't see how the doctor can tell.

MR. PLUMMER: If he can't tell, he can say so.

MR. FOX: How he can tell his recuperative powers? Of course, if he wants to testify to that, all right.

MR. PLUMMER: Q. Does age usually retard the recuperative powers of an individual?

A. I think that is a fair question to answer yes sir.

MR. PLUMMER: I except to the statement of counsel.

THE COURT: I didn't hear the statement, and I don't presume the jury did.

MR. PLUMMER: He said, "Of course, if he wants to testify to that, all right."

You may take the witness.

THE COURT: We will take a recess until half past one.

A recess was thereupon taken until 1:30 P. M., Friday, November 30, 1917.

1:30 P. M., Friday, November 30th, 1917.

THE COURT: Do you agree that the jurors are all here, gentlemen?

MR. FOX: If Your Honor please, the jury is all present.

E. L. KIMBALL: Heretofore duly sworn on behalf of the plaintiff, upon being recalled, testified as follows:

CROSS EXAMINATION

BY MR. FOX:

Q. Doctor, you and Dr. Rohrer, as I understand it, made one examination of the plaintiff?

A. Yes sir.

Q. And that examination was made a few days ago here in Coeur d'Alene, while you and Dr. Rohrer were here upon the case which was tried just preceding this case?

A. Yes sir.

Q. That examination, of course, was made at the request of Mr. Plummer?

A. It was.

Q. Now, doctor, outside of the tests which you have stated you and Dr. Rohrer made, did either you or Dr. Rohrer make any other tests or examination?

A. I don't remember that we did. We made no physical examination like pertains to the heart or lungs or kidneys, none of that, we didn't make. We had no opportunity to do it.

Q. You didn't make that examination because you didn't have an opportunity to make it, is that it?

A. Well, that so happened to be the reasons then. It was made in that room, and made without perhaps some things that might have facilitated it if it had been in my office or some place—

Q. What, for instance, would you need to make an examination?

A. If I had wanted to very badly I could have listened to his lungs with my ear, and listened to his heart. I didn't pay any attention to those things.

Q. Because you assumed that there was nothing the matter there?

A. Yes.

Q. Doctor, you did not examine the reflexes on the arm by means of an electrical current or any electrical current, did you?

A. No.

Q. The consequence is, doctor, that you are unable to state to the jury what reaction would occur were the faradic current of electricity used, would you?

A. Well, not in his case.

Q. Of course, you could tell the results of such an examination if you were able to make it with such a current, could you not?

A. Yes.

Q. Now, doctor, is it not a fact that the only way of definitely and certainly determining whether or not the nerves of the arm respond normally is by use of the faradic current?

A. To the paralysis or lack of any paraletic condition of the motor nerves, that is true. It has no relationship to the sensory nerves, which, in this man's case, were apparently,—I use that term,—affected.

Q. But it is the motor nerves, is it not, doctor?

A. Yes.

Q. Which enable a man to raise his arm or to move any other part of his body?

A. Yes. I did not say, nor did I find, Mr. Fox, any affection of his motor nerves.

Q. The only thing that you found wrong was the superficial feeling, that it was not there as you would expect to find it in a normal person?

A. Well, it is a question in medicine—I should not say that—A hysteric seems to be truly paralyzed, and yet we don't think there is any organic change set up.

Q. You simply mean, doctor, you differentiate or you give different reasons, as I understand it, why he couldn't raise his arm above that height, and a different reason why he couldn't close his hand, didn't you?

A. I did, yes.

Q. You said that he couldn't close his hand only by reason of this so-called hysteria?

A. That is my diagnosis of that contracture, that it is an hysterical one, Mr. Fox.

Q. What you mean by that, doctor, is that there is no injury to any muscle or any bone, or no breaking asunder, or direct injury to any nerve, which prevents him from closing his hand, isn't that correct?

A. Yes sir. I want to modify that some, Mr. Fox. A contracture in a hysteric may endure for years, and it may be cured tomorrow, you see. But sometimes, by the long continued contracture, they get

deformities, and finally conditions ensue by which the physical structure of some of the parts is changed and modified, and in fact the hand does get into that condition, which started as a pure hysteria. It produces what we call diseased,—we use the term pathological conditions ensue from the long continued cramp or contracture which is there.

Q. You mean a condition existing over years and years, without any effort to remedy the condition?

A. Or months, whatever length of time it is.

Q. If a person undergoes the right treatment and puts his mind upon minimizing his injuries, then there is a chance for a man of that sort to recover, isn't there, doctor?

A. I wish to say, Mr. Fox, that hysteria is the hardest disease in the world to treat, and there is no treatment for it that is effectual.

Q. Do you want this jury to understand then, doctor, that hysteria is never cured, is that what you want this jury to understand?

A. Well, I do not wish to put it quite as strong as that. I only meant to say scientifically that the treatment of hysteria is very uncertain and unprofitable, and that there is no medicine or any physical agent that has any specific character towards curing it whatever.

Q. Yes, doctor, but it is nevertheless true that a physician exercises a certain amount of mental control and mental science, as it were, impressing the patient that his injury, if any, is not serious, that he will have a chance to recuperate, and that they do

recover from that injury, isn't that not true, doctor?

A. Permit me to illustrate my answer.

Q. Answer that yes or no, and then explain.

A. I would say no to your inquiry, and yet I want to be fair with you. The great Osler says he followed a case before the criminal—

Q. I don't care what he says, doctor, I am asking you based upon your experience.

A. It is my experience that you cannot tell when a case of hysteria will recover, and I have got one on hands now that has lasted twelve years.

Q. Well, I don't care for any other case, doctor.

MR. PLUMMER: He is asking for his experience.

THE COURT: No, he is asking for his judgment, based upon his experience. He need not give his experience. It is his judgment we want.

MR. FOX: Q. Now, doctor, as contra-distinguished from that, from the plaintiff not being able to close his hand, what is the cause why he cannot raise his arm?

A. I stated, Mr. Fox, that I thought the injuries which Dr. Hansen described,—that is the only testimony I have to go upon,—indicated quite a severe injury to that joint or the connection of those bones, and that that wasn't fully repaired, that there was considerable tenderness left there.

Q. And you say that is the cause or the reason why he can't raise his arm, is that correct, doctor?

A. Well, I thought that might be the cause, Mr. Fox. Whether the hysterical condition might also aggravate that or not is another question, but I feel

that that is sufficient cause to create a pain when that arm is put upon a strain of lifting it to the normal height.

Q. How high were you able to raise that arm?

A. Well, sometimes getting it, I would hardly say more than 5 degrees above the horizontal.

Q. That is as high as you could raise that arm? Is there anything in that joint that prevents it from raising the arm any higher than that?

A. This joint that has been spoken of?

Q. The shoulder joint, generally speaking, I mean the bones, now, doctor.

A. If you mean that collar bone and that cap of the shoulder—

Q. Yes.

A. Then when you raise the arm, some pressure exists against that union between those bones, some.

Q. Caused by what?

A. Well, by the — I would say by the natural crowding of the parts there, some.

Q. Are you simply now, doctor, are you giving us the result of the determination which you made, or are you simply guessing at that now? Did you find that as a physical fact, in other words, such crowding to exist, and the reason therefor?

A. I assigned that reason when I found that I couldn't get the arm up above that point.

Q. In other words, you made no further inquiry to determine whether or not there was injury to the bone now present, which prevented him from raising that arm any higher?

A. I didn't assume that there was any injury to the bone either of the shoulder blade, which comes up there, or of the clavicle, which was united to it, that of the bony parts there was no injury, none remaining and none distinguishable.

Q. In other words, doctor, you cannot attribute his inability to raise that arm to any injury to the bone now present?

A. To the bone itself, no sir.

Q. Can you attribute, or did you find any injury to the muscles themselves?

A. Well, no. I examined and tried the movement, and thought I could feel that considerably there between those two parts which were torn asunder.

Q. Feel that. What do you mean?

MR. PLUMMER: Let him finish.

A. Those two bones that were torn asunder an inch and a half.

MR. FOX: Q. Doctor, I am asking you about the muscles now.

THE COURT: He answered no, that he didn't find any injury.

MR. FOX: Q. Doctor, did you discover yourself any injury to any tendon now existing, which causes him to be unable to raise that arm any higher than you have indicated?

A. There are no tendons there.

Q. Now then, doctor, if it is a fact that he can raise his arm over his head, or, as I show you now, what would you say as to whether or not there was any severe injury now to that arm?

A. Well, if he can raise his hands above his head, I would not say there was any limitation of motion worth mentioning there.

Q. Now, you can read X-Ray plates, can't you?

A. Yes sir.

Q. Can you tell from the plate which I now show you, and which I will ask the reporter to mark, how the patient was lying when that plate was taken, especially with reference to the arms?

A. Are you ready for me to look at it?

Q. Just as soon as the reporter marks it. This is a plate taken of Mr. Dalo, the plaintiff here, Dr. Kimball.

Said plate was thereupon marked DEFENDANT'S EXHIBIT No. 1.

A. I take it that this on this side is meant to represent this left arm?

Q. Yes, the left arm.

A. Well, now, your question to me was, Mr. Fox, what position do you think this arm—

Q. The left arm.

A. It don't show the other one—might have been held in that picture.

Q. Yes, if you are able to tell. If you are not, just say so, doctor.

A. Well, I am certainly able to have an opinion, is that what you mean?

Q. Yes.

A. Well, I should not think from the—well, I should not think at first that the arm was much above the angle that I described to the jury. I see some

other things here that bear out some of the testimony I just made as to the crowding of those parts that I meant, there, in this picture, a little. It is quite easy to be seen.

Q. The crowding of what part?

A. The clavicle, against the point of the clavicle, forcing it away a little from the shoulder, and drawing it up, as the head of the bone comes around there. Here is the clavicle, running out there, and, as I said, these parts inpinge or crowd there, you see that there.

Q. You want the jury to infer then, doctor—

MR. PLUMMER: We object to the form of the question which counsel puts all the time.

MR. FOX: The doctor doesn't answer directly, if Your Honor please, and I must rely upon inferences here entirely, and the jury must, largely, at least.

THE COURT: Put it then "you desire us to infer."

MR. FOX: Q. You desire us to infer then, doctor, that in that plate the clavicle is not in its normal position, is that correct?

A. Well, I would not say that very much distortion exists there. I think a little does, but very slightly, but that the parts inpinge. I said they kind of crowded when you forced it up here, and that is plainly shown there in the picture.

Q. Isn't that crowding upward due to the fact that when that picture was taken the plaintiff was lying on his stomach and had his arms extended, as I am showing you now, over his head?

A. Well, that might have been more or less so. In other words, I can raise my hand here easily. There isn't a man in the audience can raise his hand this way, much, to the same height.

Q. Then, in other words, doctor, you do not believe that the plaintiff cannot raise his arms this way, is that correct?

A. I didn't try him very much in this horizontal front up and down direction, like that. This is the only effort that we made, here. (Indicating.)

MR. FOX: That is all, doctor.

MR. PLUMMER: That is all, doctor. I will call Dr. Rohrer.

P. A. ROHRER: Called as a witness upon behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PLUMMER:

Q. State your name.

A. P. A. Rohrer.

Q. Where do you reside?

A. Spokane.

Q. You are a regularly licensed physician, practicing in the State of Washington, are you?

A. I am.

Q. I will ask you to state whether or not you, in conjunction with Dr. Kimball, who just left the stand, made a physical examination of the plaintiff in this case, in the Hotel Idaho, in this city, a couple of days, at my room, at my request?

A. I did.

Q. During the time you were attending here as physician in another case?

A. Yes sir.

Q. Now, doctor, I wish you would describe, first, what tests you made to ascertain whether or not he had any sensation on the left side of his body, including his leg, neck, and head, and the purposes of those tests, and just the manner in which they were made, so as to ascertain whether or not he could simulate a want of sensation or not. Just describe that.

A. Mr. Dalo was completely stripped of every article of clothing he had on, and the test I first made—

MR. FOX: I understand the tests made are the same?

MR. PLUMMER: They are just the same.

MR. FOX: It isn't necessary to go over them.

MR. PLUMMER: You may have four or five doctors to dispute all of those things; I don't know.

THE COURT: Go ahead.

MR. PLUMMER: Go ahead.

A. I first examined those sensations with a pin. I stuck a pin all over his arm, his left side, and leg, clear down to his feet and toes, from the top of his head, and there was absolutely no sensation. I would stick the pin clear in his skin and let it stick there. Just as soon as I would cross the mid-line onto the right side, over on the right arm or leg, he could feel the prick of the pin. After that I had Mr. Lavin blindfold him, and I found the same thing. I wasn't

exactly satisfied with those tests, so I waited awhile, and Mr. Dalo, not being able to speak English very well, it required all of his attention to try to find out what Mr. Lavin or Dr. Kimball were saying to him, so when the conversation was going on I stepped in behind him and stuck the pin into his back on the left side, and he paid no attention, and I stuck it in his left arm, and it was the same way, and down his leg, and it was the same way, but just as soon as I stuck the pin in his right side he jumped and was distracted from the conversation that was going on. I waited awhile until his attention was absolutely centered on either Dr. Kimball or Mr. Lavin, and I did the same thing. This time I went to the right side first and stuck the pin in, and he jumped, and I waited awhile and did it on the left side, and he paid no attention. Later on I got a glass of water, the water being so hot that you couldn't put your finger in it, and I got in behind Mr. Dalo, and while his attention was distracted I poured it over his left shoulder, and he paid no attention. I poured some more over his right shoulder, and he jumped away from me. I lighted a match and held the flame of the match up against his left arm, and I had to draw the flame away so as not to blister the skin. I transferred the flame to his right arm, and immediately he jumped away from me. That concluded my tests for his sensations.

Q. State whether or not, doctor, from those tests you made and the extent of those tests, whether in your opinion he has any sensation in that left side

of the body, clear from the top of his head to the bottom of his left foot.

A. After making those tests I felt absolutely certain in my mind that he wasn't faking.

MR. FOX: I move that the answer be stricken out, if Your Honor please, as incompetent, irrelevant and immaterial.

THE COURT: Yes, it may be stricken out.

MR. PLUMMER: Q. State, doctor, whether or not, in your opinion, he could, under those tests, he could simulate—

MR. FOX: Oh—

MR. PLUMMER: Just a moment.

Q. Simulate a want of sensation in that part of the body described?

MR. FOX: I don't think that is proper. That is just getting at it in another way.

THE COURT: The objection is sustained.

MR. PLUMMER: Upon the theory that I have no right to prove that?

THE COURT: Oh no.

MR. PLUMMER: Then I don't know what the objection is based upon.

THE COURT: You may ask him whether or not he had any sensation on that side, in his judgment.

MR. PLUMMER: He has already testified to that, but I wanted to go a little further, if I could, and show that—all right.

Q. Doctor, I wish you would describe what you found, if anything, with reference to this hernia, and make it as brief as possible, because I don't think

there will be much dispute about that, and I think Dr. Kimball has been over that.

A. That is about the first thing we noticed with him after he undressed, was a large protrusion in his left groin, and it extended down to his scrotum, so much so that the scrotum was filled up with the contents of the hernial sac.

Q. What is hernia usually caused by?

A. There are different theories for the cause of hernia. Some authorities claim that hernias are congenital, that they occur at birth, and have existed from the time of birth. Others claim that there are other reasons, either some defect in the abdominal wall, which may have developed due to either injury or disease, or some other condition of the abdominal wall.

Q. Assuming that this man is 53 years old, and he had the accident which has been described here, in your presence, with which I presume you are familiar, state whether or not that could cause a hernia, doctor, or in your opinion, in this particular case, assuming that he had no hernia before the accident, and hasn't had any injury or strain since that time, whether or not in your opinion that accident did cause that hernia or produce it.

MR. FOX: I don't think sufficient facts have been given to the doctor upon which to base an answer of that kind.

MR. PLUMMER: Well, I don't want to go over it all again.

MR. FOX: You should put the hypothetical ques-

tion before him, if Your Honor please. We have a right to cross examine.

THE COURT: I think I shall let him answer.

A. I can answer provided I can explain my answer.

MR. PLUMMER: You have a right to explain any answer you make.

WITNESS: State your question again, please.

MR. PLUMMER: Q. Assuming that all of these facts that have been testified to by Dr. Hansen, as to the condition he found right after the accident, assuming that this accident happened as the plaintiff has described it on the stand, assuming that he had no indication or any feeling of hernia before the accident, that he has not had any strain, or any force, or any fall, or anything that would produce a hernia, and this hernia developed a few months after the accident, started by feeling a slight soreness there, and kept getting worse all the time, and has developed now at this time into the condition it is in, the accident having happened about eleven months ago, him being a man about 53 years old, and before this accident perfectly healthy and able to do any amount of manual labor, state whether or not, in your opinion the hernia was produced by that fall.

A. Yes, provided that before that injury there was no congenital defect or acquired defect in that abdominal wall, it must have started with that injury.

Q. If there had been any congenital defect, the

patient would undoubtedly have had some notice of it or some feeling, wouldn't he?

MR. FOX: I object to that.

THE COURT: Well, would he, doctor?

A. I don't know; I couldn't say.

Q. Did you attempt to raise his left arm up in a horizontal position?

A. I did.

Q. State what the result of that attempt was.

A. The first test I made—

THE COURT: Is that a position of the arm out laterally?

A. Yes, straight out from the body, with the palm down. First I had him raise it as far as he could himself. I then took his hand and attempted to raise it, but just as soon as I would start to raise it past this horizontal position he would complain of severe pain in the shoulder, and wouldn't permit me to raise it any further. So in that test I waited quite a while until his attention was again centered on something else. All of a sudden I would attempt to raise it, and he would complain of pain, and I would ask him where the pain was located, and he would point to the point of his shoulder.

Q. Did he show any actual manifestations of pain that were objective, other than simply saying that he was pained? Could you see anything by his expression that would indicate to you an objective symptom of pain, when you would raise it up that way?

MR. FOX: I object to that as purely speculative.

MR. PLUMMER: If you will admit that he actually had the pain I don't care about the question.

MR. FOX: Of course I don't, counsel.

THE COURT: I think you may answer.

A. Pain is usually a subjective symptom. What you can, by the expression of the features of the patient, or the way he acts, feel quite certain that there must be some pain there.

Q. Doctor, to what do you attribute this loss of sensation? To what condition of this man do you attribute the loss of sensation, as having any connection or relation with the injury, and also this inability to close his fingers further than he described, if you believe that is a fact.

A. In my opinion, so far as I am able to judge, I would say it is due to a traumatic hysteria.

Q. State whether or not that is a real condition, as distinguished from an imaginary one.

A. You can't say that it is a real disease, because in hysteria you don't have any real organic lesions, you don't have a disease like typhoid fever will produce a disease, or some other condition—simply psychological disease, and that condition can start from an injury.

Q. And if it is traumatic hysteria it must start from an injury?

A. Yes.

Q. Trauma means injury or blow?

A. Yes.

Q. Received from a blow. Doctor, what do you say, in your opinion, based upon the facts which have

been related to you, and your examination, is the reasonable probability of the permanency of any of his condition,—I mean any of the abnormal conditions, either the hand, or his inability to raise the arm, or the traumatic hysterical condition, or any other abnormal condition, if any, what parts do yuo say in your opinion, are permanently, if any, and what parts are not, in your opinion?

A. I can't answer that, to say they are permanent or not permanent. Hysteria is a very peculiar disease. Some conditions go from bad to worse, and sometimes they go on,—pathological diseases or conditions develop within the body, and sometimes they get well soon.

Q. Take a man 53 years old, for instance, in the condition you found this man in, from your examination, physically, and state whether or not his chances are lesser or greater to recover than a younger man, a man 24 or 25 years old, for instance.

THE COURT: That is, in this particular condition of hysteria?

MR. PLUMMER: Yes.

A. Well, age is always considered a detriment to recuperation from any disease.

MR. PLUMMER: You may take the witness.

CROSS EXAMINATION

BY MR. FOX:

Q. Doctor, you raised your arm like this (indicating), didn't you, just now?

A. Yes.

Q. When you raised your arm higher you twisted your hand, didn't you?

A. Not necessarily. I don't know that I did; I might have.

Q. Now then, doctor, if you twist your hand far enough you can raise your arm clear up, can't you?

A. I think I can, yes.

Q. Now then, if you keep your palm in that condition, you can't raise it quite so far, can you?

A. I can't raise it clear up; I can raise it up.

Q. Doctor, if it is a fact that the plaintiff can raise his arms like this (indicating) over his head, there isn't anything very seriously the matter with that shoulder or the muscle, is there?

A. Well, I don't know. I wouldn't say there wasn't.

THE COURT: The question is whether you would say there was.

A. No, I couldn't answer that either way, Your Honor.

MR. FOX: Q. Now, doctor, did you test any of the other reflexus than the skin reflexus, the sensation you have talked about?

A. Yes, I tested the skin reflexus.

Q. I say other than the skin reflexus, that is what you tested, the skin reflexus, with the pricking of the pin.

A. That was simply in regard to sensation.

Q. Did you test any other reflexus?

A. Yes, I tested the patella reflexus.

Q. And they were normal?

A. They were, as far as I remember, almost equal on both sides.

Q. Did you test any other deep reflexus?

A. I tested the Gordon and the Chattock, and the Oppenheim.

Q. Just what is the Gordon reflex, doctor?

A. The Gordon reflex consists of pressing on the patella tendon with your fingers, on the back part of the leg, and by pressing on that you get a toe drop.

Q. And those were normal on both sides?

A. Yes.

Q. And the Chattock?

A. The Chattock consists of irritation of the skin with a pin or some other—

Q. That is the skin reflex. Now, the Oppenheim.

A. The Oppenheim reflex consists of rubbing up and down the shaft of the tibia, and by irritating that you get a flexion of the toes.

Q. Doctor, did you test the reflexus of the deltoid muscle?

A. I did not.

Q. Did you test it of the triceps and biceps muscles?

A. I did not.

Q. The deltoid is the muscle of the arm?

A. The shoulder, yes.

Q. And the biceps is the muscle that shows when a man throws up his forearm like that (indicating)?

A. Yes.

Q. Where is the triceps?

A. That is in the back part of the arm.

Q. You were unable to use the Faradic current, were you?

A. We didn't use any electrical appliances at all.

Q. Doctor, did you determine that there was still an injury to the bones of the arm, the shoulder?

A. There are no injuries to the bone of the arm, so far as I could determine.

Q. Now, let me ask you about this hernia. As I understand it, you cannot say definitely whether or not this hernia was caused from the accident, with the facts that are before you?

MR. PLUMMER: If Your Honor please, I think the question is unfair.

THE COURT: Read the question, Mr. Reporter.

(Question read.)

MR. PLUMMER: He says definitely. That would indicate, with a degree of certainty.

THE COURT: The doctor has stated that he doesn't know whether this is a result of a congenital weakness or whether it is the result of this accident. If it isn't a result of congenital weakness, that he thinks it is a result of this accident. Is that what you mean to say?

A. If you rule out all these conditions before defects in the abdominal wall, either acquired or congenital.

MR. FOX: Q. Does that presuppose, does your answer presuppose or take into consideration the testimony of Dr. Hansen, that he did have a hernia when he came into the hospital?

MR. PLUMMER: No, the doctor didn't testify to

that. He testified that he thought he had on a truss, and he wasn't certain about that.

THE COURT: He thought he had a hernia, and he thought he wore a truss. In making your answer you put aside those two statements of the doctor?

A. Well, I didn't consider the injury at all. I considered that other reasons were excluded from before the accident.

THE COURT: But you were first asked if you take all the statements of the plaintiff to be true, and all of those of Doctor Hansen. Dr. Hansen did testify that he thought he wore a truss, and he thought he had a hernia at the time he came there. In your answer you assume that he didn't have a hernia before, and wasn't wearing a truss?

A. Yes, I would assume that he was normal before that.

MR. FOX: Q. Now, assuming that he did have a hernia when Dr. Hansen first saw him, could that hernia have been caused by the accident?

A. I will have to answer that again, yes, provided there was no defect the moment before he fell down that shaft, that there was no acquired or congenital defect, he could have acquired that hernia when he hit the ground. There might have been a bursting or rupture of the openings that go down into the inguinal canal.

Q. You say some authorities deny that an injury can cause a hernia?

A. No. I said some authorities deny that all hernias must be congenital.

Q. But most of the authorities, and the better authorities in medical science, allege and claim and assert that all hernias are congenital?

A. No, I wouldn't say that; I don't know that.

Q. Is it not true that some of the best authorities so state?

A. I know some of the authorities so state.

Q. And now, doctor, what is the fact as to whether or not men with hernias like the plaintiff can work, that is, whether or not they are not permanently incapacitated from work by reason of the fact that they have such a hernia?

A. Of the large size that he has?

Q. Yes.

A. I would say that it would certainly interfere with hard labor.

Q. But men do labor with those hernias, do they not, by wearing a truss?

A. Oh yes, they do some kinds of labor.

Q. Doctor, of course, if there is evidence here that he had a hernia prior to this accident, you could not, or no physician could say that the accident caused the hernia?

A. If he had a hernia prior to the accident?

Q. Yes.

A. It would rule out the causation of the hernia being the accident.

Q. Then the accident is not the cause of the hernia at all?

A. No sir, that if he had a hernia before. It might aggravate it slightly.

Q. Now, doctor, a hernia is a comparatively easy matter to operate upon, is it not?

A. It is curable.

Q. How much does such an operation cost?

A. The prices vary.

Q. Well, what would a reasonable competent physician, with adequate experience in such matters, a surgeon, charge?

MR. PLUMMER: You mean just the physician, or the necessary hospital, and all the expenses?

MR. FOX: I am asking now the doctors charges, taking into consideration of course, the fact that Mr. Dalo is a laboring man.

A. The average price is around $150 to $250.

Q. As a matter of fact the physicians in Spokane charge from $75 to $100 for that operation, do they not?

A. I guess some of them would charge less than that.

Q. I mean capable men, men who would do that work just as well as anybody?

A. I don't know.

Q. You know that $100 is a large fee for such an operation, don't you?

A. It might be in some localities, for some persons.

Q. In your locality, doctor?

A. Possibly.

MR. FOX: I think that is all.

REDIRECT EXAMINATION

BY MR. PLUMMER:

Q. Assuming that he couldn't raise his arm any higher than you ascertained he was able to when you examined him, to what condition of the ligaments or muscles would you attribute that inability?

MR. FOX: You might ask the doctor what he attributes it to, without suggesting that he should attribute to a muscle or a ligament, counsel.

MR. PLUMMER: All right.

Q. To what do you attribute it to, doctor?

A. It is pretty hard in his case to state any definite reason. It can be due to his traumatic hysteria which he has, that is aggravated by some pain or tenderness. Again it might be due to the malformation of that joint; by that I mean having united in a mal position, in such a way that it might produce some pain. That I can't say.

Q. In operating on a hernia of the kind found in this man, what other expense is there besides the doctor himself?

A. You have the hospital expense. You have to pay extra for the operating room, and if you have a private nurse, the nurses expenses.

Q. What would they be — medicines, bandages and supplies, and all the things you speak of?

A. In operating on any case you have to look out for complications. If you operate on that man and he develops infection following the operation, that infection might lay him up for months.

MR. FOX: I think that is purely speculative, if Your Honor please.

MR. PLUMMER: It is all speculative, I suppose, more or less.

A. If everything goes along in the ordinary course of events, he ought to be laid up about two weeks, and possibly from any heavy labor a month after that.

Q. What would the total expense be, doctor, counting the fees which you say are ordinarily charged for a competent physician,—I don't mean any physician, but a competent physician,—and counting the hospital bills and medicine, and whatever you have to have to cure him, in case he should recover?

A. Hospital fees in a ward, the usual amount—

Q. Just approximate it.

A. It would be about $12 a week for a ward. The operating room I think is usually $10 extra, and if he has a private nurse, I think they usually get about $25 a week.

Q. And anything for bandages and medicine?

A. Some hospitals charge extra for medicine?

MR. PLUMMER: That is all.

RECROSS EXAMINATION

BY MR. FOX:

Q. Of course, it is very seldom that cases of that kind need special nurses?

A. No, it isn't necessary.

Q. The hospital furnishes adequate, competent nurses, does it not?

A. Yes.

Q. And you know of any number of cases where those nurses have taken care of such cases, without the necessity of calling in a special trained nurse?

A. I discharged a hernia case from the hospital Tuesday that hadn't a special nurse.

MR. FOX: I think that is all.

MR. PLUMMER: That is all.

THE COURT: Doctor, how high should the normal man raise his hand, held out laterally with the palm down?

A. He should be able to raise it above a horizontal position.

Q. Both hands? Should a man of his age do that?

A. Yes, if there is nothing abnormal.

Q. That is, where a man stands with both hands straight out at the sides?

Q. And the hands stiff, palm down?

A. Yes.

Q. Do you think a man of his age should do that?

A. I don't see why a normal man couldn't. He held his arm absolutely horizontal.

Q. I am trying to get at it so that the jurors will know what the experiment was. It was to hold them straight out with the palm down and the arm stiff?

A. Yes.

Q. The jurors perhaps will want to experiment on that when they go to their own room, for themselves.

MR. PLUMMER: At the time you made these

experiments with the plaintiff, did you require him to take, to put both of them out at the same time?

A. No.

Q. Just one at a time?

A. Just one at a time.

MR. PLUMMER: That is all, doctor.

THE COURT: Of course, that is the reason that I suggested this to the doctor, because some of us can raise our hands a great deal further than others. I am very sure that counsel can raise them at least a foot further than I can.

MR. PLUMMER: Doctor, they have produced a photograph here, or an X-Ray. I don't know where they got it from, but I assume from counsel's inquiry that they are going to claim they have a picture of this man. State what position he appeared to be in when this picture was taken.

A. I cannot interpret this photograph. In the first place it is rather indefinite, and I wouldn't say just exactly what position that arm was in.

MR. PLUMMER: That is all, doctor.

MR. FOX: That is all, doctor.

MR. PLUMMER: We rest.

FREDERIC WILLIAM ROSS, Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q. State your name, doctor.

A. Frederick William Ross.

Q. Where do you reside?

A. Mullan, Idaho.

Q. You are a physician and surgeon, are you not?

A. I am.

Q. Duly licensed to practice in Idaho?

A. Yes.

Q. Do you know the plaintiff, Mr. Angelo Dalo?

A. I do.

Q. I will ask whether or not you recollect the time of the accident and injury to him in question?

A. I do.

Q. Doctor, prior to that time state to the jury whether or not Mr. Dalo had a hernia, and whether or not a truss was provided for him.

MR. PLUMMER: Just a moment. I think that I shall raise the statutory objection here to the doctor testifying, if the plaintiff was a patient of this doctor, and he has voluntarily talked with the other side, I object to his testifying, and, if necessary to show that he was the attending physician, I ask to examine him on his voir dire.

THE COURT: Very well.

CROSS EXAMINATION

BY MR. PLUMMER:

Q. Were you attending Mr. Dalo professionally?

A. At the time of the injury?

Q. No. At the time mentioned there when counsel asked you about his having a hernia?

A. Yes.

Q. Were you treating him then?

A. Yes.

Q. Are the matters that counsel wants you to

testify about matters connected with your examination of him professionally?

A. They are.

Q. And matters and things that you found out while conducting that examination, as necessary to the treatment, were they?

A. How is that question?

Q. And those were things which you discovered, and necessary for you to discover in order to have you treat him?

MR. FOX: I think that will be conceded, counsel, if you make the objection.

MR. PLUMMER: I object to it on the ground of privilege.

MR. FOX: If Your Honor please, there are exceptions. I think I discussed this before Your Honor.

MR. PLUMMER: I would like to ask one other question first.

MR. FOX: I will concede that Mr. Dalo was the doctor's patient, and that these facts were found out during the examination, while Mr. Dalo came to him as a patient.

MR. PLUMMER: I wouldn't ask you to concede what facts were found out. I am not conceding that he found any such facts, but I asked if he was testifying—

Q. At that time you were the first aid physician for the company, were you not?

A. Called for him.

MR. PLUMMER: I insist upon my objection.

MR. FOX: If Your Honor please, there is some

question, and the courts have decided this matter differently, and I don't like to state the reasons just now.

THE COURT: My impression is against you. If you desire to be heard, that is, if you desire to call to my attention any decided case in which such facts are involved—

MR. FOX: There are such cases. If Your Honor please, I haven't them with me. If Your Honor will remember, we had that matter up once before, and Your Honor ruled against me, and I am going to make a record on this. I didn't bring my cases with me, possibly I should have done so.

THE COURT: If that is the case, perhaps we can simplify it, because if I ruled against you advisedly I would be inclined to adhere to that ruling, unless there has been some more recent authoritative case.

MR. FOX: The question arose with reference to Dr. Hansen testifying, Your Honor will remember.

THE COURT: I remember in a general way that a question of that character was discussed here. I shall sustain the objection.

MR. FOX: And we will take an exception, if Your Honor please.

THE COURT: Yes.

MR. FOX: That is all, doctor.

LEONARD E. HANSEN, A witness heretofore duly sworn on behalf of the Plaintiff, upon being recalled on behalf of the Defendant, testified as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q. Doctor, you have testified heretofore, having been called by the plaintiff in this case, have you not?

A. Yes.

Q. Doctor, how long was Mr. Dalo in the hospital?

A. He entered the hospital on the 13th, and went out on the 27th.

Q. At that time, how soon after the injury did you remove the cast, or whatever you called it—the apparatus you had on his arm?

A. I think it was four weeks probably.

Q. Four weeks afterwards?

A. Yes.

Q. Two weeks in the hospital and two weeks after that you removed it?

A. Yes.

Q. When did you last see him?

A. About the first of April.

Q. And what was his condition at that time with reference to the dislocation of the clavicle?

A. Well, that was practically down. It was down so far as the eye could see.

Q. Have you seen him since that time?

A. No, I haven't.

Q. What is the fact, doctor, as to whether or not a certain amount of stiffness temporarily results from holding an arm in a position for any length of time, a month, as you suggest, by means of a cast, or other apparatus?

A. Well, you always get stiffness following a cast or a splint.

Q. How does the patient get rid of or relieved of that stiffness?

A. The gradual exercise, gradual working of the muscles and cords of the joints, massage and electricity and heat.

Q. How long did you have it immobilized up in a splint?

A. About a month.

Q. And that would cause considerable stiffness for a period of time, afterwards, would it?

A. Yes sir, it would.

Q. Doctor, did you get a good reduction of the chromion clavicular joint?

MR. PLUMMER: We will concede that he did, under the circumstances. We are not claiming anything against the doctor here in treatment at all.

MR. FOX: That is all.

CROSS EXAMINATION

BY MR. PLUMMER:

Q. Doctor, take a man, however, who has been used to working say all his life, physical exercise, and for some reason his arm is kept in an immobile position, say by a cast or anything else, for a period of a month, if everything is normal, the stiffness ought to get out in at least another thirty days, hadn't it?

A. No; it takes longer than that.

Q. It doesn't take eleven months, does it, doctor, as a rule?

A. No, two or three months should get it pretty well out.

MR. PLUMMER: That is all.

REDIRECT EXAMINATION

BY MR. FOX:

Q. That is provided—

MR. PLUMMER: I object to that as leading.

MR. FOX: Q. Assuming, doctor, that the patient does not use his arm?

A. If he doesn't use it, that is different.

MR. FOX: That is all.

RECROSS EXAMINATION

BY MR. PLUMMER:

Q. Suppose he tries to use it. That would tend to take the stiffness out, wouldn't it?

A. No; he would have to get motion in his joint.

Q. If he tried to use it, and used it as far as he could without paining him pretty bad, that would tend to work it out in two or three months, wouldn't it?

A. Well, it would be necessary for him to get motion in that joint. For instance, if ones elbow joint were broken, and you put it up in a cast, you would then be obliged to start very gradually to move it. If you just tried to move it and didn't move it, you never would get it out. It would be necessary actually to get some movement there.

Q. I mean this, that if that arm is taken down and everything is healed up, and we will say that he is in a normal condition so far as possible to have it, no pains, no injury to the ligaments or muscles

or anything of that kind, could union of the parts that has been dislocated, and the only thing that has caused the stiffness is because it has been in that position for a month, there is no reason why any man in that condition, if there is no abnormal condition, shouldn't by the ordinary use, or trying to use that arm, take that stiffness out in two or three months?

A. No, he should.

Q. And if he was unable to do it, doctor, you would say, wouldn't you, as a physician, that there must be some other cause for it?

A. Yes.

MR. PLUMMER: That is all.

MR. FOX: That is all, doctor.

H. P. MARSHALL, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOX:

Q. Doctor, what is your full name?

A. H. P. Marshall.

Q. Where do you reside?

A. Spokane, Washington.

Q. You are a physician and surgeon, are you not?

A. I am.

Q. Doctor, you graduated at the Harvard Medical College?

MR. PLUMMER: We will admit the doctor's qualifications.

MR. FOX: Q. And had hospital training since that time?

A. Yes sir.

Q. You have practiced how long, doctor?

A. I have practiced twelve years, when I haven't been away studying at some of the clinics.

Q. Doctor, did you make an examination of Mr. Dalo, the plaintiff in this case?

A. Yes sir.

Q. And when was that examination made?

A. About three days ago.

Q. In Spokane?

A. In Spokane, yes sir.

Q. What did your examination consist of?

A. I made a complete examination of him, with the exception of the sensation of the feet; I didn't do that. I made an X-Ray of the shoulder, and my complete examination included electrical examination of the muscles of the left upper extremity.

Q. Now, doctor, what did the X-Ray show? Did you make an X-Ray plate of both the left and the right shoulder?

A. Yes sir; and we made an X-Ray of the entire left clavicle. That X-Ray showed nothing, with the exception of an old thickening of the left clavicle, and on account of the fact that the thickening was so bony, and even denser than the original bone, it could be construed as nothing but an old injury of some sort, and when I say injury, he may not have been thrown, or anything of that sort; it may have been an infection, but at some time he has had either a disease or a fracture or injury of the left clavicle.

Q. Outside of that the X-Ray showed a normal condition of the bones?

A. Yes, bones and joints.

Q. Now, doctor, you took this X-Ray or these X-Rays of the whole clavicle?

A. Yes.

Q. In what position did you have him on the table?

A. When we took—we had him lying down on the X-Ray examining table, a table about as long as that one there, laying face down, with his hands up this way (indicating). I don't say that they were up—I am a little younger than he is, but we told him to put them right up straight, and the X-Ray shows that they were approximately up as far as they go, about normal for a man 53 years old.

Q. Did he put them up of his own volition?

A. He did.

Q. Did he complain of pain when he was raising his arms then?

A. I didn't hear him say so.

Q. Doctor, you say you made the complete examination, similar by that detailed by the other doctors?

A. Yes. My examination was the same as theirs, except that I made a physical examination, which, of course, wasn't necessary. I just did it for completeness sake. He didn't complain of any trouble with his heart or lungs, but I just did it.

Q. And you also made an examination with an electrical current?

A. Yes sir.

Q. Now, doctor, just explain this Faradic current.

A. It is sufficient to say, I think, that there are two different types of currents that we use in diagnosis of nerve and muscular conditions. One is known as the Faradic current, which is simply the induction current, and the other is the continuous or galvanic current. A normal muscle gives a certain normal formula, which you wouldn't understand—you would have to understand more than electricity. We use such terms, but it is sufficient to say that there is a normal formula to which muscles react, and when they don't we speak of a reaction known as the reaction of degeneration, and whenever muscles and their nerves are interfered with so that there is a partial death or throwing out of commission of a muscle or nerve, then we get either a partial or complete reaction of degeneration. He didn't have that.

Q. What would that show or prove?

A. That showed that there was no atrophy of the muscle, and consequently no organic disease of the nerves themselves.

Q. Just state what atrophy is.

A. Atrophy is a shrinking of the muscle. There was no shrinking of the muscle. If you injure a motor nerve organically, then you get a shrinkage, and we speak of that shrinkage as atrophy.

Q. When you speak of a motor nerve you mean the nerve—

A. By means of which you can do any motor work.

Q. For instance, when you open and close your

hands, the motor nerves are the things that compel the muscles to do that?

A. Yes.

Q. Doctor, is there any evidence of any injury present to any of the ligaments of the arm or shoulder?

A. I couldn't find any evidence; that is, any consistent evidence that withstood further investigation.

Q. I meant to ask you in reference to this opening and closing of the hand. What did you find, doctor?

A. He just simply—it was his statement that he couldn't do it, but when we put the Faradic current on it, he could do it.

Q. In other words, it proved that the nerves are still there to do it?

A. Yes, it proved that all the apparatus was there to do it, but, as the doctor said, he is a nervous individual, and has this mental condition which precludes it temporarily, I think, however.

Q. Just explain that hysterical condition, doctor. You say it is a nervous condition?

A. Hysteria,—I think the best definition I have ever seen,—is a condition in which ideas control the body and produce morbid changes in its functions. You know how we are controlled by our thoughts and ideas, and if I get it thoroughly in my mind that a certain thing is so, it goes a long ways towards the realization of that thing, and if a person becomes hysterical there is a morbid thought, from one reason or another, that really obtains, and is the dominating factor in the life of that person, and it must

be gotten through the mind, as Dr. Kimball said, through the mind, and not through medicines or anything of that kind.

Q. What effect has litigation such as a suit of this kind upon person of that kind?

MR. PLUMMER: I don't think the doctor is qualified to answer what effect litigation has.

MR. FOX: Q. Any excitement, such as litigation?

A. Anything that one is doing intently and becoming absorbed in, has a tendency to be centralized upon that group of activities and thoughts, and litigation is no exception, of course.

Q. Now, doctor, I will ask you to tell the jury in your own way whether you consider that this nervous condition or hysterical condition, as it is sometimes called, such as you found in the plaintiff, is curable or incurable, in all probability, and your reasons.

A. Most of the cases of hysteria are curable. I think that his is a curable case, for these reasons: First and foremost, an incurable hysteria is extremely rare in a man. In the second place, at the end of eleven months, assuming that the accident was the primary cause of it, you would expect him to be in worse shape than he is now, provided he was going on to an incurable condition. He himself can now go clear up here (indicating); that is practically normal for a man 53 years old. The normal in the joint simply takes you up past a horizontal position. You can put your hand back there yourself and feel

what actually permits you to go up that way. He can do that, and there is no motor paralysis along with this. In other words, at the end of eleven months, if he were going to go on and become an incurable hysteric, he would be further along, in my opinion.

Q. What do you mean by further along?

A. Those cases that are going to be incurable have a tendency to go on, and after a while, after they become supremely exaggerated, they can't move the arm at all. I have seen cases where they have lain in bed for years, and can't move anything, until some person especially versed in that domain of medicine has come along and fathomed it out and put them on their feet.

Q. Now, doctor, let me ask you in reference to this hernia. I am assuming that Dr. Hansen found a hernia present, and found that he wore a truss, indicating that the hernia had existed prior to the time of the accident. I will ask you to state whether or not, in your opinion, the accident can be given as the cause of the hernia?

A. Under those circumstances, of course it could not.

Q. What have you to say as to whether or not accidents cause hernia, doctor?

A. My opinion is this, and I think this is the consensus of opinion, that each and every man is born either with a canal which is closed and has no sack, and therefore is never going to have a hernia, or he is born with an open sack, and may have a

hernia under certain conditions. Assuming that that is true, and I believe it is, then accidents can never be the only cause of hernia. It can be a tributary cause, but the essential cause is the anatomical makeup.

Q. Now, doctor, what is the fact as to whether or not the plaintiff's hernia can be relieved by a surgical operation?

A. I think it is one of the easiest operations we ever do. It is pure ex-abdominal; there is no abdominal work. It is simply sewing up that ring.

Q. How long would he be in the hospital with such an operation?

A. If everything goes well,—they differ a little, a few days,—I think a man with a rupture should stay in bed two weeks, and just spend the next week sitting up, and three weeks more before he goes to manual labor; six weeks from the day of the operation until he goes to heavy labor.

Q. Have you performed any of those operations, doctor?

A. I have performed quite a few, yes, sir.

Q. Doctor, are those operations successful,—I mean usually speaking.

A. They are almost always successful. It is one of the most successful operations we have.

Q. A failure in that is a rare thing, isn't it?

A. With the exception of those cases where the people have carried it for years and years, and caused a shrinking up of the muscles which we would sew together.

Q. But assuming that this is a new condition, that it has arisen, as is claimed by the plaintiff, that the first time he noticed it was on the 20th of November, which was a few days ago.

A. I don't see how it could get so big in that time. It goes away down into the scrotum, you know.

Q. You say it couldn't have gotten that big in that time?

A. I wouldn't say it couldn't, but I couldn't understand it.

Q. I am assuming that it is a new hernia, that is, something that he is suffering from only since the 20th of November. What was the prognosis as to an operation?

A. Very good indeed.

Q. And after an operation he wouldn't have any more trouble, would he?

A. No.

Q. Now, doctor, I understand that you have specialized in surgery, have you not?

A. I consider that my specialty. I do some general work, general practice.

Q. What would your charges be for an operation of that kind, taking into consideration—

MR. PLUMMER: I don't think that is proper, if Your Honor please.

MR. FOX: Q. Are you familiar, doctor, with the charges that the physicians and surgeons of standing make in this community?

A. It varies according to the financial condition

of the man. I should say that $100 is a good respectable fee for a working man, for a successful hernia operation.

Q. And the hospital fees are just about as Dr. Rohrer said?

A. $12.50 a week in a ward,—that is where most of the laboring men choose to go. That is good service, just as good as a room, with the exception, of course, of the secretiveness.

Q. Doctor, did you find any actual limitation of the motion of the hand?

A. No, except that he didn't do it himself, is all, and then when you did it, he said that it hurt it.

Q. Now if, doctor, he has such a limitation of motion, and if it is the result of this hysterical condition, of course the minute that condition is cleared up, the normal use of his hand will result, will it not?

A. He will have to take a little time to strengthen those muscles, assuming that he hasn't used them. They don't show that marked inactivity that he says, but assuming that he hasn't he would have to strengthen them up a little, even after he became in that condition that he would do it.

MR. FOX: I think you may inquire.

CROSS-EXAMINATION by
MR. PLUMMER:

Q. Doctor, didn't his arm, his left arm, as compared with his right arm, didn't it show an absolute absence of atrophy?

A. Didn't his left arm?

Q. Yes.

A. There is no atrophy, no, that I can determine.

Q. And doesn't non-use—I don't mean use to the extent he did before—but doesn't non-use tend to promote or produce atrophy?

A. An absolute non-use would, yes.

Q. In other words, it would indicate to you that he had used it, or that he was able to use it, would it, from an examination of those two arms?

A. No, I wouldn't say that; it would indicate that he was using it a little.

Q. It wouldn't indicate the contrary, either, would it?

A. No, it wouldn't indicate either.

Q. With reference to this hernia, I think you said a man might be predisposed, or something synonymous to that, but predisposed to hernia.

A. I think he must be predisposed.

Q. Assuming that every man must be predisposed that ever gets it, he may go on forever and never get hernia, isn't that true?

A. Of course, we have no way of proving that, because we would have to open up those that had predisposition, but didn't develop the hernia.

Q. But if he was predisposed to hernia, wouldn't a shock or a strain or an injury tend to produce the hernia that might not be produced except for the shock?

A. Oh, yes, I said that. I said that that was—I said that that would be a contributary cause.

Q. This condition of traumatic hysteria is a real condition, isn't it, doctor?

A. Oh, yes; there is no question about it.

Q. In other words, it isn't simply an imaginary condition on the part of the patient?

A. It isn't imaginary, as we usually speak of it, but it is an imaginational disease, if you get my drift.

Q. I think I do.

A. If I had an hysterical fixed idea in my mind that I couldn't move that right hand, of course it would be just as real while it lasted.

Q. Suppose, doctor, I would take your arm and raise it so far, and then I would start to raise it six inches more, and you would feel sharp pains that would make you grab me impulsively, there is nothing imaginative about that pain, is there, doctor?

A. I couldn't say about that. It is very hard to say whether a man has pain or not, at times.

Q. If you were treating this man simply as an ordinary patient, you would assume, wouldn't you, that if he demonstrated or had those manifestations, that he was suffering pain, wouldn't you?

MR. FOX: That is immaterial, if Your Honor please. That isn't a fair question. That isn't the condition here.

THE COURT: I think I will let the doctor answer, with such explanation as he desires to make.

WITNESS: May I ask you to repeat that question?

MR. PLUMMER: Q. Suppose you were examining this man, he was called into your office, and was being examined, and you would raise his arm

that distance (indicating), we will say, and then when you would start to raise it more he would indicate to your satisfaction as a doctor that he really was suffering pain, you wouldn't think, would you, that those manifestations were purely the result of an imaginary condition?

THE COURT: Of course, that would be reasoning in a circle, or asking questions in a circle. If he convinced him that he was suffering from pain.

MR. PLUMMER: I will change the form of the question.

Q. Suppose that when you would raise it a little higher, that he would impulsively grab it quickly, and his facial expression would indicate pain, and those different symptoms which are apparent to a doctor that there is pain, other than the statement of the patient, you wouldn't think, would you, that that was not pain, would you?

A. Well, there would be three classes of cases. There would be the case where the man became pale, rapid pulse, and all those symptoms from which I would know that he was in pain; there would be the other, where, by talking a little, that I would know he wasn't in pain; and then there would be this great big category in between that I wouldn't know.

Q. When you speak about a person's ability to raise his arm up like that?

A. Yes.

Q. And some men, on account of their age, I suppose, after we get a little old—

A. Yes.

Q. If I could only raise it so far, and trying to raise it further wouldn't cause pain, it would simply be inability on account of stiffness?

A. Inability, and I don't think there would be much pain, unless, of course, he was one of those old stiff fellows that had never done this (indicating), and had always done this (indicating).

Q. But the kind you speak of, where men of that age usually can't raise their arms as high as some other men,—

A. Yes.

Q. It is usually the result of stiffness as distinguished from pain, isn't it?

A. Yes.

Q. If this man, however, experienced excruciating pains in that place where he received his injury, where he fell down this chute, in that same joint or part of the shoulder, collar bone, when he would raise his hand higher than this (indicating) or along there, that wouldn't be on account of ordinary natural stiffness, would it?

A. No, not if he had that there in that place. This fellow doesn't complain of pain in the place where the doctor said he was injured.

Q. Doctor, I didn't ask you that, did I?

A. No.

Q. That is volunteered, isn't it?

A. Yes.

Q. He complains, don't he, of pain when you start to raise his arm?

A. He complains of pain, yes.

Q. And the pain was somewhere in this part (indicating). It couldn't be here (indicating), of course, in the muscles or ligaments or some part of the locality where he was injured?

A. In the locality, yes, but not in the exact place.

Q. He didn't pretend to take his finger and point to a certain spot?

A. Yes, I wanted to localize,—that was important for me to know; I pinned him right down to exactly where it hurt him.

Q. This traumatic hysteria, that means, I think, —it has been testified to here before, that means an hysterical condition produced by trauma or injury?

A. Yes.

Q. Trauma is the Greek word for blow?

A. Yes, Greek word for injury, I think.

Q. Either one,—I am not sure about that. You are probably correct. And certain persons suffering from traumatic hysteria can be cured by directing their mind in a certain channel for a certain length of time until the influence from the hysteria has completely gone, can't they?

A. Yes, sir.

Q. And you never know, do you, when some influence may be brought to bear upon a patient suffering from traumatic hysteria which may produce that result?

A. The curative result, you mean?

Q. Yes.

A. That is right; you never do. Sometimes—

Q. Sometimes—

MR. FOX: Let the doctor finish his answer.

A. Sometimes when you least expect it, something that is not intended for that purpose will produce that result.

Q. Absolutely cured?

A. Absolutely.

Q. Then, what do you mean when you tell the jury, using your expression, as near as I can, when a man is going to be incurable he will be further along than he is now, when you say that he can be cured even suddenly or quickly or impulsively by the influences which you described?

A. It is not at all incompatible any more than sticking a knife into an abscess.

Q. How do you say a man is going to be incurable if he can be cured by the conditions you describe?

A. There are certain cases incurable. You asked me this question, if there were not cases of hysteria which would respond to suggestions like that. I answered you yes. That is not at all incompatible with my other statement, that there are a certain small fraction of cases which are incurable, but I don't believe they go along as long as this man is supposed to have had it without getting worse than he is. This man hasn't very much hysteria. He has a little loss of sensation, and can't take it up any farther than this (indicating). He hasn't got a complete paralysis, doesn't complain of seeing things double, and a half dozen other things which are the natural consequences of increasing hysteria.

Q. Traumatic hysteria affects different people in different ways?

A. Yes.

Q. Depending upon the physical condition or mental construction of the particular patient?

A. Yes.

Q. You just examined this man once for about an hour, didn't you, in Spokane?

A. Well, about two hours and thirty minutes I saw him altogether, but then I was away from him altogether—about one hour and thirty minutes actual contact.

Q. During which time you were taking these photographs?

A. No. That is in the two and a half hours.

Q. And you were sent there to examine this man by the defendant company?

A. I went there with the defendant's attorney and Mr. Lavin.

Q. You were employed by them?

A. Yes.

MR. PLUMMER: I didn't want the Court to infer that we took you over there, although we might in some other case.

WITNESS: No.

MR. PLUMMER: Q. Now, doctor, you replied to questions propounded to you by counsel, as to the different normal conditions of this man, and also about using a battery on him. In the first place I want to ask you about the X-ray. An X-ray plate taken of a person does not show the muscles, ligaments or nerves, does it?

A. It doesn't show the ligaments or nerves, but it does show the outline of the larger muscles, that is to say, it doesn't differentiate the different muscles from each other, but it gives you—

Q. Can you see any muscles in that picture, doctor?

A. Yes, sir. I said it didn't differentiate them, but all these soft parts,—over here is the bone. It doesn't differentiate the differences between those three layers of soft structures, but that is muscle there, I know, from anatomy, but the whole thing here, skin, subcutaneous tissue, down to the bone.

Q. It doesn't show an injury to the muscles?

A. It can show certain injuries to the muscles, but usually it doesn't.

Q. It doesn't show the nerves?

A. It doesn't show them unless there is something wrong with them.

Q. The purpose is to show the bone structure and the hard substance?

A. That and—well, in connection with bones, it is, yes.

Q. And that is what this plate was taken for, to see the condition of the bones?

A. Of course we inject fluids into the cavities, and X-ray those, but in connection with this it would be to show the bone. In other words, if I take an X-ray picture of a joint it would be to show the bones and the relationship of the joints, yes.

Q. That plate wasn't intended, and doesn't show, and couldn't show, if it existed, any injury to the muscles or ligaments, could it?

A. No, sir.

Q. And when you put this battery on this man for the purpose of ascertaining the condition of his muscles, that was the purpose of it, wasn't it?

A. Muscles and nerves, what we call the neuro-muscular arch.

Q. You used two different kinds of electricity, did you?

A. Yes.

Q. And one kind absolutely showed no result at all?

A. The galvanic.

Q. You put the galvanic battery on these parts, and it didn't indicate that there was any nerve there at all?

A. No.

Q. What do you call the other one?

A. Faradic.

Q. That will pretty near shake anything out of anybody.

A. It won't to a dead muscle.

Q. It will show that a muscle is in good condition, even if there is no sensation in the nerves themselves, won't it?

A. No, not if there is no sensation. I don't know what you mean by sensation. Do you mean skin sensation?

Q. I mean the Faradic current.

A. That is the ordinary battery.

Q. That wouldn't show whether sensation was destroyed or not?

A. Sensation of his skin?

Q. Yes.

A. No, it wouldn't show that, but that is immaterial.

Q. I didn't ask you that, doctor, whether it was material. You are not trying this case, are you?

A. Excuse me. I shouldn't have said that.

Q. Speaking about these conditions of traumatic neurasthenia being caused by the excitement of the lawsuit, don't you think that falling down a hole 27 feet or more when a man isn't expecting to fall at all would tend in some slight degree to shock a person?

A. I should say it would.

Q. Then this condition could be produced by that kind of shock, couldn't it?

A. The hysteria?

Q. Yes.

A. Yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Where did you finally locate this pain?

A. I located it in different places, but at no time when I examined him did he locate it over the chromion clavicular joint. It was usually located in front, over the shoulder joint itself.

Q. When you made this test with this Faradic current, is that a stronger current than a galvanic current?

A. Yes, it is a stronger current. To a normal current it is a stronger current, but you can take the

strongest Faradic current, and a muscle whose nerve is completely paralyzed will not react on it.

Q. Doctor, did you have to use an extreme strength of the Faradic current in this case to get reaction?

A. No. I have forgotten whether it was ten or fifteen mili-amperes, but it was the ordinary diagnostic switch we have. It is about one-quarter of the possibility. Of course I did use it more later to get the relative strength of the contact, but it was equal on both sides.

Q. On both arms?

A. Yes.

Q. This test was not made for the purpose of examining skin sensation?

A. No. I used a pin for that.

MR. FOX: I think that is all.

RECROSS-EXAMINATION by
MR. PLUMMER:

Q. There is such a thing, is there not, as transferred pain, that is, the condition which produces the pain may be in one part of the body, and the actual feeling of the patient in another part?

A. There is such a thing as transferred pain, yes.

Q. For instance, take appendicitis, where the appendix is inflamed, isn't it quite often that the patient will feel the pain in the upper abdomen?

A. Yes, sir.

Q. And the cause of it is away down here on the right front side?

A. Yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Has that analogy anything to do with this case, doctor?

A. I can't see it.

MR. PLUMMER: I think that is an improper question.

THE COURT: I didn't know whether there was any analogy.

MR. PLUMMER: I will explain to Your Honor the purpose of the question.

THE COURT: I understand your purpose, but I don't know whether what you speak of would apply to this particular case up here.

MR. FOX: Q. Why hasn't that principle or analogy any application here?

A. It is pretty hard to explain that to a layman. I don't know just how to go about it. This so-called transferred or referred pain, in contra-distinction to the so-called reflex pain, is from the same segment, that is to say, of the spinal column or cord. The spinal cord is divided into segments, one, two, three four, up to thirty-one, I think, and every one of those segments, in each one of those segments is represented a certain portion of the body. Now, if the appendix is involved, it gets its nerve supply from the same segment of the spinal cord as the stomach does, and the gall bladder, and a number of the internal organs, and if the inflammation which produces the pain is so severe it may, by transference, produce the major part of the pain in the stomach. But what

I was speaking of in connection with this case here, —in those cases, however, the tenderness is over the appendix, and not over the stomach, and that is how we tell that it is a transferred pain, and not due to a stomach disease. And so it is up here. This man claims he had pain all over, but his tenderness is not at the place where it is supposed to be produced. It is anterior to that. I don't know whether I have myself clear or not.

MR. FOX: I think he did.

Q. In other words, doctor—

THE COURT: No, you need not repeat.

RECROSS-EXAMINATION by
MR. PLUMMER:

Q. When you say, "where the injury was produced," what injury do you mean?

A. I read the complaint, and I had reference, when I said that, to the chromion clavicular joint.

Q. But you don't know where any of the muscles might have been injured some distance away from the actual bone injury, do you?

A. I was just referring to the joint.

JUROR: May I ask a question?

THE COURT: Yes.

JUROR: Did you use the battery before you used the X-ray?

A. I used the batteries afterwarls, about three-quarters of an hour afterwards, in another place, about half a mile away.

MR. FOX: The X-rays were taken at the hospital, and the other was down in your office?

THE COURT: Would it make any difference in the diagnosis of the case whether the electric current was used before or after?

A. No, not at all, just the same. You don't change the electrical reactions of a man's body by passing the X-ray current through it.

JUROR: I have used electricity quite a bit myself, so I know what electricity will do quite a bit myself. I have been crippled myself, crippled with rheumatism, and had to walk with a cane in each hand, and I used the batter five minutes, and got up just as well as I ever was.

THE COURT: Is there anything further with this witness?

MR. FOX: That is all.

THE COURT: Of course the other jurors will not be influenced in any way by the statements the juror has made as to his experience. It will be very dangerous, gentlemen, for you to go to your room and listen to experiences of that kind, because we, as laymen, are unable to interpret these conditions sometimes, as to just what the cause of an injury is or what its cure is.

JOHN C. BROWN, a witness heretofore duly sworn on behalf of the Plaintiff, upon being recalled on behalf of the defendant, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. State your full name, please. You have testified before?

A. Yes, sir.

Q. You were the shift boss in immediate charge over Mr. Dalo on that day, were you not?

A. Yes, sir.

Q. Was anybody under you in charge?

A. No, sir.

Q. Now, Mr. Brown, how many men did you have under you that day, as near as you can recall?

A. Probably fifty men.

Q. And over what distance were these men scattered?

A. They were on two different levels, 1600 and 1800.

Q. And the 1800 level is 200 feet below the 1600, is it not?

A. Yes, sir.

Q. And they were scattered through the stopes from the 1800 to the 1600, and through the 1600 up as far as that would be carried?

A. Yes, sir.

Q. How many floors were they working on the 1600?

A. Three different floors.

Q. Three different floors?

A. In that part of the mine.

Q. How often would you get around to the men?

A. Two and three times a day.

Q. Upon this day did you get there before this chute was drawn?

A. About eight o'clock in the morning.

Q. When did you next get around?

A. Immediately after lunch.

Q. Immediately after lunch?

A. Yes.

Q. That was the time that they were taking Mr. Dalo out of the chute?

A. Yes, sir.

Q. Between the time in the morning, that is, before the chute was drawn, and the accident, you were not in here or had opportunity to be in there?

A. No, sir.

MR. FOX: You may inquire.

CROSS-EXAMINATION by
MR. PLUMMER:

Q. You had charge of those levels, didn't you?

A. Yes, sir.

Q. And this place where the accident occurred was a portion of those levels?

A. Yes, sir.

MR. PLUMMER: That is all.

MR. FOX: That is all.

JUROR: May I ask this man one question?

THE COURT: Yes.

JUROR: As foreman of the mine did you forbid that man from walking over that chute or not?

A. No, sir.

JUROR: That is all.

MR. FOX: I think that is all, Mr. Brown.

MR. PLUMMER: That is all.

EMIL CLAWSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. State your full name, please.

A. Emil Clawson.

Q. Where do you live?

A. Mullan, Idaho.

Q. You are employed by the Federal Mining & Smelting Company in the Morning mine, are you not?

A. Yes, sir.

Q. Were you employed by them on the day that Mr. Dalo fell down the chute?

A. Yes, sir.

Q. State whether or not you were the man who got Mr. Dalo out?

A. I was.

Q. When was it with reference to the time that you finished lunch that you got Mr. Dalo out?

A. About ten minutes after.

Q. And what time was it?

A. Ten minutes after twelve that we started.

MR. FOX: That is all.

CROSS-EXAMINATION by
MR. PLUMMER:

Q. How did you get him out?

A. With a rope.

Q. With a rope?

A. Yes.

Q. Pulled him out, did you?

A. The boys sent me down the chute, and tied a rope around me, and sent me down the chute.

Q. I didn't ask you about that. How did you pull him out?

A. I pulled him out by hand.

Q. How deep down was he?

A. About twenty-seven feet.

Q. In going to where he was, where had you come from?

MR. FOX: I object to it as not proper cross-examination.

MR. PLUMMER: The details of his getting there.

MR. FOX: No, I simply asked him the time. My object was to specify the time they started to pull him out.

THE COURT: Objection sustained.

MR. PLUMMER: That is all.

MR. FOX: That is all.

JUROR: I would like to ask him a question, if Your Honor please.

THE COURT: Yes.

JUROR: Did you work up on the same floor with this man?

A. Yes, sir.

THE COURT: You couldn't ask him any questions, Mr. Juror, unless they related to his answers as to the time he pulled this man out, because that is the only matter he was asked about.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Do you know how wide the opening into that chute was, Mr. Clawson?

A. Not exactly. I should judge it was about sixteen or eighteen inches.

Q. And, Mr. Clawson, where was that hole approximately with reference to the walls, whether it was in the middle or—

A. It was closer to the foot side.

Q. Could a person pass on either wall without stepping on that hole?

MR. PLUMMER: We object to that. It is simply calling for his conclusion.

MR. FOX: Q. Was there room enough?

MR. PLUMMER: Without steeping on the hole, you say?

MR. FOX: Without stepping on the hole.

MR. PLUMMER: I withdraw the objection.

MR. FOX: The ore above the hole, in the place where the hole was.

MR. PLUMMER: We withdraw the objection.

THE COURT: Answer the question. Could you pass without passing over that hole?

A. Yes, sir.

MR. FOX: That is all.

RECROSS-EXAMINATION by
MR. PLUMMER:

Q. But he would have to walk on the ore, anyway, wouldn't he?

A. Yes.

Q. The ore extended all over the surface from the foot wall to the hanging wall, didn't it?

A. Yes.

Q. And when it is covered up with this ore, un-

less you happen to know where the hole is, there would be nothing to indicate where it was, from the appearance of the surface, would there?

A. If a man knows the stope he would know where the hole was.

Q. I say if he didn't know where it was, there would be nothing on the surface of the ore to show where it was, would there?

A. No, sir.

MR. PLUMMER: That is all.

MR. FOX: That is all. We rest, if Your Honor please.

MR. PLUMMER: I will call Mr. Dalo.

ANGELO DALO, a witness heretofore duly sworn in his own behalf, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by
MR. PLUMMER:

Q. When Dr. Marshall examined you and he had you there where he was taking the X-ray plates, these plates that he has shown here, how did he place your hands or arms?

A. This way (indicating).

MR. PLUMMER: That is all. We rest.

CROSS-EXAMINATION by
MR. FOX:

Q. You were on your stomach, flat on your stomach, weren't you, Mr. Dalo?

A. That way (indicating).

Q. Right flat on your stomach?

A. My head that way (indicating).

Q. You were lying on a table, weren't you?

A. That way (indicating).

Q. You were lying on a table?

A. That way (indicating).

MR. FOX: That is all.

MR. PLUMMER: That is all. We rest.

MR. FOX: I desire to make a motion, if Your Honor please.

THE COURT: The jury may retire into the corridor.

(The jury thereupon retired from the court room.)

MR. FOX: Comes now the defendant, Federal Mining & Smelting Company, and moves this Honorable Court to direct the jury to bring in a verdict for the defendant, for the following reasons, to-wit:

1. That if the plaintiff was injured as complained of in his complaint, he sustained the injuries by reason of no carelessness or negligence on the part of the defendant which was either the approximate cause or in any way contributed thereto.

2. If the plaintiff came to his injuries as alleged in plaintiff's complaint, he was injured by his own negligence and contributory negligence.

3. If the plaintiff was injured as complained of in his complaint, he was injured by reason of a risk which was incident to his employment and which he assumed.

4. If the plaintiff was injured as complained of in his complaint, and the negligence of the chute tender is relied upon, in failing to clear the top of

the chute, then he was injured by virtue of the negligence of a fellow servant.

(The motion was thereupon argued by counsel.)

MR. FOX: In view of the suggestion made by counsel, or the inference at least made by counsel, that the negligence here consists of the failure of the chute tender to warn, I would like to add to my last ground, the negligence of a fellow servant, to-wit, the chute tender, in failing to warn.

(The motion was thereupon further argued by counsel.)

MR. FOX: I would like to ask counsel one question, wherein did we fail to use reasonable diligence to make this place reasonably safe?

MR. PLUMMER: Either through the shift boss or the man whom you had delegated to do that work. He had two hours to clean up three floors, to see whether it was done.

MR. FOX: In other words, you claim that every time we draw a chute we must send a shift boss around to see whether or not it is hung up?

MR. PLUMMER: I think it is neecessary in order to keep a man from falling down 27 feet, yes, to see what is going on in that mine.

THE COURT: I think the real difficulty here, as has come to be more or less common with these pleadings, is in determining whether or not the question of negligence is within the scope of what should be submitted to the jury. I haven't any doubt that it is a case which upon the evidence should properly go to the jury.

MR. PLUMMER: We will ask then that the pleadings be amended.

THE COURT: This occurrence here was such as might happen at any time, although it happened rarely. It is obvious that a hole there 16 to 18 inches wide, if the muck above it was of sufficient depth, it might become hung up at any time. That is a matter of simply common knowledge. Now, as to whether it did happen very often is another question. If it happened sometimes it might happen any time. It isn't a case of an accident that happens for some occult reason or because of conditions which one could not anticipate, because when this occurrence did take place it took place as a consequence of the operation of some very familiar laws. Propably the principal question is as to whether or not the master, in this case the defendant company, had taken reasonable precautions in devising a system by which an accident of this kind could be obviated. Now, if conditions change in the course of the operations of the employees, the master of course is not bound to be present at all times, through one of its principal agents or officers, to see that the place is kept safe. I need not expatiate on that principle, because we know it applies under a great many conditions. Dangerous conditions are arising constantly in the progress of the work. Naturally, the master cannot protect the workman against dangers of that character where the work is changing from moment to moment. It may be this danger now and another danger the next moment, and so forth, as in the

construction of a house or driving a tunnel. But this doesn't strike me as being a danger of just that character. It is possible that the defendant company had so organized its work there, with proper instructions to those who did the work, and one of its servants failed in its duty to make safe a place of this character, it would be relieved from any responsibility, and it might be very well regarded as the negligence of a fellow servant, but so far as appears here, the defendant company did not take any precaution at all against this danger. I wouldn't say that if the defendant had instructed this man who drew the ore down, drew the chute, whatever it is called, if it had impressed upon him the duty of at once going up and seeing that the ore was not hung up at the top, and he failed to perform that duty, that the company would be held responsible. But here is a case where the danger is an obvious one, that if the ore did hang up there the condition was such as to be very perilous. It is a condition that ought to have been provided against. The precautions ought to have been reasonably adequate to prevent the occurrence of such a peril.

MR. FOX: There is no such negligence in this complaint, if Your Honor please.

THE COURT: There is that difficulty. I haven't any doubt, so far as the evidence is concerned, that the case should go to the jury. There is the allegation in paragraph 13 that the defendant carelessly and negligently failed to provide, and so forth.

MR. PLUMMER: I would ask this then, if Your

Honor please, that if there is any variance between the proof, the complaint, and the testimony having gone in without objection, I move to amend the complaint to conform with the proof.

MR. FOX: If Your Honor please, I don't think that an amendment of that kind should now be allowed. We have tried that case upon a theory which counsel has propounded. and that paragraph of the complaint bears out the suggestion we have made. We are advised in that complaint that this ore chute had been drawn four days previous, and a long time had intervened, and we are not ready and in a position to submit this case upon any new theory of that sort. We are certainly taken by surprise, if the Court please, and if Your Honor thinks that upon this evidence some theory can be framed whereby the case might go to the jury, I think we ought to have ample opportunity to prepare to meet such a theory. It is certainly in no wise disclosed in the complaint, it being simply and purely one of a danger that existed, not by reason of any negligent act of ours in failing to provide proper methods or means, but negligence is charged solely upon the theory that this was a discoverable danger, and that we had ample and adequate opportunity to discover the same. That is the theory upon which this case has been tried and upon which we had prepared this case long before we came down here. We are certainly not prepared to meet any new theory that is suggested in the complaint after the case is closed. We don't even know now what the allegation would

be. We haven't been able to give the matter any thought or consideration.

MR. PLUMMER: As I say, the evidence went in without any objections, and I think this theory of being taken by surprise is largely an imaginary one. Their defense was contributory negligence and fellow servant, so they must have known what caused this accident. They couldn't have been taken by surprise. They had the whole situation in front of them, and I think the complaint is sufficient. There is sufficient general allegation in here, and the proof having gone in here without any objection—

THE COURT: I think I shall deny the motion, and submit the case, with instructions which I think will fall within the allegations of the complaint. It will be somewhat narrower than if the complaint had more fully set forth the theory.

MR. FOX: If Your Honor please, we desire an exception.

THE COURT: Yes.

MR. FOX: It is difficult for me at the present time to see upon what theory Your Honor could submit the case.

THE COURT: Substantially this, Mr. Fox, that if the jury believes that the defendant company failed to exercise reasonable precautions to provide against an accident of this kind, by either instructions to their workmen or by a more frequent inspection, the jury can find in favor of the plaintiff, unless they find that he himself, knowing of the conditions and being able to appreciate them, assumed

the risk. I don't know whether you want an instruction upon contributory negligence or not. You were in doubt at the beginning of the case.

MR. FOX: Not contributory negligence. I was speaking of fellow servants.

THE COURT: In your answer do you plead contributory negligence?

MR. FOX: Yes.

THE COURT: You plead contributory negligence and assumed risk?

MR. FOX: And assumed risk, but we did not plead fellow servant, because we had no suggestion in the complaint.

THE COURT: Do you now think there is any room for an instruction of that?

MR. FOX: Upon contributory negligence?

THE COURT: No.

MR. FOX: On fellow servant?

THE COURT: Yes.

MR. FOX: Well, not if Your Honor holds that no active chute tender was responsible for it.

THE COURT: What I am trying to get at is, do you contend that there is any evidence upon which I could submit an instruction based upon the theory or the assumption that the jury might find that the negligence was that of a fellow servant?

MR. FOX: No, I am frankly stating to Your Honor, I don't see it, but that was the suggestion made by counsel, that this chute tender was negligent in his duty, in failing to go up there.

THE COURT: Of course he wouldn't be if that

wasn't within the scope of his duties. If he had been instructed to do that by the master, and failed to do it, that would have been negligence, but, as I understand, the evidence shows he was not instructed.

MR. FOX: If Your Honor please, he had no means of going through; it was closed up above.

MR. PLUMMER: The answer of the defendant covers that whole thing.

THE COURT: It is unnecessary to read that, because counsel now states, as I understand it, that he does not want an instruction upon that defense, which is sometimes set up, but you do want an instruction upon the assumption of risk, and also upon contributory negligence?

MR. FOX: Yes. I was going to ask Your Honor; Your Honor said that you were going to submit this case to the jury upon only one theory, and that is as to whether or not we had, under the circumstances here, provided sufficiently against the occurrence of such an accident, first, by instructions, and second, by a more frequent inspection, is that it?

THE COURT: Perhaps I might make this a little clearer to you. The general principle is well understood that it is the primary duty of the master to take care to provide a reasonably safe place for the servant to work,—start with that proposition.

MR. FOX: Yes.

THE COURT: It is the master's duty not only to make such original provision, but by reasonable inspection from time to time to see that the place is

kept reasonably safe. Now, that may be done, of course, either by one of the principal officers, or it may be done by employing someone else to act for the master in that respect. Now, did the company fail in this duty, by failing to have one of its superior officers, or employees, such as the shift boss, to inspect this more frequently, or in failing to have the man who attended the chute inspect it more frequently?

MR. FOX: I was going to ask Your Honor, what bearing would instructions have upon this, how could instructions have aided?

THE COURT: In this way: Suppose that here is a piece of work in the prosecution of which certain dangers are created. One was this danger. Now, was it reasonable for the master to let that work proceed without making some provision to see that that danger didn't occur. Now, if it had provided that the men upon the floor for instance, should look out to see that the chute was not hung up, and protect themselves against danger, that might have been done. It might have been provided that the men who drew the chute, or the ore from it, should immediately go up and see that the ore was not hung up at the top. Now, suppose it had done that, then the question would be an entirely different one from what it is now.

MR. FOX: Let me make a suggestion to Your Honor.

THE COURT: Yes.

MR. FOX: I think it ought to be clear now, and I

will just use this model here for the purpose of illustration. According to the evidence given by Mr. Millette, the manway of the floor on which the opening of the chute is, is always closed. That must necessarily be always so, for the protection of Mr. Millette. In other words, he can't get through there unless he goes down at least one floor or several floors, and goes over here 25 feet, or, as the evidence shows in this case, over to the third chute, or over to the eleventh chute over here, and makes a circuit of hundreds of feet, it is an absolutely impracticable thing under the evidence that the man who is the chute tender should take care of that chute, and that eliminates him.

THE COURT: Let me ask you this question. Mr. Fox. Here is a condition which is attended with very great danger, which does occur. Now, assuming it to be correct that there are a number of men pass back and forth in this rather dark passageway far beneath the surface of the ground, and they are passing back and forth over this, now does it not strike you as being rather inhumane for the master not to make some provision by which men can be protected from the possibility of falling as this man did.

MR. FOX: Yes, and that is what was done in this case.

THE COURT: Call my attention to it.

MR. FOX: The evidence of the plaintiff is that he knew the place where this chute was, that a slide chute had been provided there by the muckers, and he

knew that chute was there. The testimony is he could have passed on either side of it without stepping right on to it, to the middle of it.

THE COURT: But it is stated that sometimes this is on one side and sometimes on the other,—I mean these holes,—that they are sometimes near one wall and sometimes near the other and sometimes in the center. Now, if this was fully covered to the depth of a foot or two, how could he determine where that hole is? Suppose he undertook to pass along near the footwall. and it turned out that that was the very place where the hole was, then wouldn't it be suggested that he was negligent, because he should have kept in the middle?

MR. FOX: If Your Honor please, the slide chute leads into that hole. It is put there for the purpose of letting muck down from this floor into this hole, without carrying up this chute, because it is needed here on this floor.

THE COURT: Yes.

MR. FOX: Now. the existence of that chute there tells him approximately where that hole is, must necessarily do so, and anybody knows that a chute isn't built running in here when the hole into which the stuff is to be put is over here, and he manifestly walked right straight up through the center towards this chute.

THE COURT: That would be a question of his contributory negligence then. That matter hasn't been very clearly brought out.

MR. FOX: Your Honor was asking whether there

were any physical indications which would indicate where the hole was, as bearing upon the question of the negligence of the master.

THE COURT: I don't remember that testimony has gone in which makes that very clear, so far as that is concerned.

MR. PLUMMER: The plaintiff testified that the slide was shoved over to one side, which misled him as to where the hole was.

MR. FOX: No. He said it was over on one side.

THE COURT: Of course, if that was customary, to have that chute come right down to the hole, and it did it in this case, and he knew of that custom, and still deliberately walked over the hole, when he could have gone by the side, that would necessarily be contributory negligence on his part, but under the evidence that would have to be submitted to the jury.

MR. FOX: Yes. Of course, I understand Your Honor to say that Your Honor couldn't submit the case to the jury excepting in the view that you have taken of it. Now, we are at least surprised to the extent that I think we should be allowed to prove that particular fact. that these chutes are run in the immediate direction of the hole, and they show for themselves the position of the hole.

THE COURT: Well, I will permit you to prove that. Of course, we cannot be governed entirely here by the fact, as to what other phase of it, that you called my attention to before, so that it won't come up again before I submit it to the jury,—you stated that Mr. Brown had a certain number of duties to per-

form, had about fifty men under him, and couldn't be there all the time, but after all the provision against danger must be reasonably adequate against the peril of such dangerous condition. Now, if the chutes were to be drawn from time to time, and the hole was liable to be hung up in the chute, and men were passing back and forth, it would be a question for the jury as to whether or not the defendant company was negligent in requiring so many duties of the shift goss that he couldn't be there within a few moments after the chute was drawn, or of having someone else up there to see it when it was drawn. I am clearly of the opinion that as to the question of the defendant's negligence the case should go to the jury. The grave doubt that has arisen in my mind is as to whether or not the theory upon which it should be submitted is sufficiently set forth in the complaint, but I can't see how you will be taken very much by surprise in that respect, and therefore I have concluded to submit the case to the jury, but it is unfortunate that these complaints can't be drawn to state the facts, rather than to conceal them. I must say that I am very much dissatisfied by the way it turns out in many of these personal injury cases. It seems that no reasonable amount of care is taken to draw the complaint in such a way as to state the facts as they are going to be shown at the trial. It is asking the Court to do a good deal sometimes in order to avoid injustice, to give such a liberal construction to these complaints as to enable us to submit them to the jury. But in this case, as I say, I can hardly see

how the defendant can be prejudiced by submitting the case to the jury upon the theory upon which I am going to submit it, and therefore I shall let it go, although it is to be conceded, must be conceded, that it is giving a very liberal construction to the pleadings and ignoring some of the allegations entirely. Now, as to the other point, I will permit you to reopen the case, if you want to,—this matter of the incline you speak of.

MR. FOX: If Your Honor please, I haven't had an opportunity to ask the different witnesses about that. I would like to have an opportunity to consult them. Of course, I can put then an and ask them how the muckers build those chutes.

THE COURT: Perhaps I had better give you five minutes. You can go back and ask them now, so as not to take too much time.

(A short recess was thereupon taken.)

THE COURT: Have the jury come in, Mr. Bailiff.

(The jury thereupon returned into the court room.)

MR. FOX: Mr. Brown, will you take the stand again, please?

JOHN C. BROWN, a witness heretofore called on behalf of the defendant, upon being recalled testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. Mr. Brown, you are familiar with the slide chutes, are you?

A. Yes, sir.

Q. I will ask you to take a look here at a model, and ask you to state what that is, just in a brief sort of way.

THE COURT: You have seen it, have you?

A. Yes sir.

THE COURT: What is it?

MR. FOX: Q. Just point out what the different things represent on that model.

A. These represent the posts,—this the cap,—this the floor.

Q. This represents two floors in a stope, does it not?

A. Yes sir.

Q. And these round posts that are set upright

MR. PLUMMER: Don't lead him.

MR. FOX: It is for identifying the model, if Your Honor please.

THE COURT: That is probably a matter of common knowledge, isn't it, Mr. Plummer?

MR. PLUMMER: Yes, as to the posts and floors.

THE COURT: Is the bottom supposed to be a level?

MR. FOX: Not entirely. It is made a little wider.

THE COURT: Assuming that that is the floor there, there would be three floors shown, wouldn't there?

MR. FOX: Yes, but there are no posts. These uprights represent the stulls or timbers that are put into the floors, do they not?

A. The caps.

Q. To hold the caps?

A. Yes.

Q. And these pieces are caps?

A. Yes sir.

Q. And the pieces in between the caps underneath the flooring, are pieces that are put in there to hold both the stulls, the uprights, and the caps in place?

A. Yes.

Q. And these blocks here are what are called head blocks, aren't they?

A. Yes.

Q. Used to wedge in the caps?

A. Yes.

Q. And this flooring is made of what kind of timbering?

A. Three inch.

Q. Three inches thick?

A. Yes.

Q. This box arrangement in the center, what is that?

A. A chute.

Q. What sort of timbering is that made of?

A. Six inches thick.

Q. And that is what is called the chute?

A. Yes.

Q. That is carried up from floor to floor as the work progresses upward?

A. Yes sir.

Q. There is an arrangement over here on the left-hand side, what does that represent?

A. That represents a slide chute.

Q. A slide chute?

A. Yes.

Q. On the lefthand side of the lower floor I see a ladder. What does that represent?

A. That represents a manway.

Q. Now, assuming that this middle floor here, the one in which the hole is in the floor, represents the floor on which the plaintiff was working and from which he fell into the chute, I will ask you what the fact is as to whether or not the manway at that point is covered?

MR. PLUMMER: Just a moment, if Your Honor please. The permission to open the case was not for that purpose, I understand it. He was permitted to open it on account of this slide.

THE COURT: Well, he can go into that. That is a closely connected matter.

MR. FOX: Answer the question.

A. What is the question?

Q. As to whether or not the manway is covered at that point?

A. Yes sir.

THE COURT: Can you state why it is covered?

MR. FOX: Yes, why is it covered?

A. In order to keep the muck from going down in the manway.

Q. Who uses that manway alongside of the chute?

A. These men, when they climb up and down, when that manway is open, most anybody can use it.

Q. That is the manway that is used also by the chute tenders also?

A. Yes sir.

Q. You say this is a slide chute, this arrangement I point to now?

A. Yes.

Q. And what is the purpose of that? What is the function of it? What is it used for?

A. It is used to drop the muck from the floor above and slide it into the chute, and save trouble.

Q. Why don't they carry this chute right up to the next floor, instead of putting that slide in there?

MR. PLUMMER: That was all gone over before, if Your Honor please.

MR. FOX: If that is understood then. I don't think it has all been gone over, however. Just answer the question. There is some controversy as to whether or not it was answered.

THE COURT: Answer the question.

A. The slide chute is to carry the muck into the chute.

MR. FOX: From the upper floor?

A. From the upper floor.

Q. Who builds these slide chutes?

A. The muckers.

Q. The muckers themselves?

A. Yes sir.

Q. Where do the muckers build those slide chutes with reference to the openings into the chute itself?

A. They build it as near as they can to the hole?

Q. If there is a slide chute there, what is the fact as to whether or not a person who walks over a muck

pile that is piled over the chute can determine where the hole is in the chute?

A. He can, pretty close.

Q. Just explain what you mean by "he can pretty close."

A. He can tell by the slide chute about where the hole is. The slide chute leads to the hole, and by looking at that slide chute he would know pretty near where the hole was in the floor that goes into the chute.

Q. How wide was the hole into that chute? Did you measure it?

MR. PLUMMER: That has all been gone over.

MR. FOX: No, it hasn't been gone over.

THE COURT: He may answer.

A. I measured it.

MR. FOX: Q. When did you measure it?

A. After they took the man out.

Q. The same day?

A. The same day.

Q. How wide was it?

A. Thirteen inches.

Q. How wide was the hole?

A. Three feet.

Q. What was the width of the stope?

A. It would average about six feet.

THE COURT: Is the length of it in line with the floor, or transversely?

A. It is in line with the stope.

MR. FOX: Q. With the floor?

A. Yes.

THE COURT: In line with the stope?

MR. FOX: Q. The length of the opening runs lengthwise of the stope, doesn't it?

A. Yes.

MR. FOX: That is all.

MR. PLUMMER: Are you going to use this model?

MR. FOX: Just for illustration, is all.

CROSS EXAMINATION by
MR. PLUMMER:

Q. These posts are set right up against the wall of the stope, aren't they?

A. No.

Q. How far are they away from the wall?

A. That varies,—a foot or six inches, and sometimes two feet.

Q. And also sometimes two inches?

A. Very seldom that close.

Q. And sometimes six inches?

A. Six inches.

Q. This model here seems to show—you don't intend to say that that is the way the situation was at this particular place at that time?

A. Yes sir.

Q. The same as the model is?

A. Yes sir.

Q. How wide is this place, the part on the side?

A. Probably twelve inches.

Q. And how wide on the other side?

A. Probably eight.

Q. Eight inches?

A. Yes.

Q. And how wide between these posts?

A. Three feet and a half, something like that.

Q. Then this model isn't in proportion, that is, the distances between these posts isn't in proportion to the size of this hole as it is here, is it?

A. I don't know. I didn't scale it.

Q. How wide is this slide chute?

A. They build them about two feet and a half.

THE COURT: You are referring to the particular slide chute at that point at that time, are you?

MR. PLUMMER: At that time, at that point, if you saw it?

A. I saw it.

Q. How wide is it?

A. I would judge about three feet.

Q. Then it didn't occupy the same proportion of space between the posts in the stope as this occupies in this model, did it?

A. Question?

Q. How wide would you say it is, this slide chute?

A. Probably three feet.

Q. And how wide between these posts?

A. Three feet and a half.

Q. Three feet and a half between the posts?

A. Yes.

Q. Then if the hole was on one side and this slide chute was moved over this way, for instance, it would indicate, wouldn't it, if it was all covered up with muck, that the hole was over here-

A. Yes.

Q. And then a man would, of course, feel perfectly safe in walking over here, wouldn't he?

A. Yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. What is the fact as to where the holes are customarily placed, these holes in the floor leading into the chutes?

A. Over the center of the chute.

Q. Over the center of the chute?

A. Yes.

Q. Where is that, with reference to the stope?

A. Generally built more to the footwall than the hanging.

Q. How was this built, towards the footwall?

MR. PLUMMER: Don't suggest to him now. That isn't fair.

THE COURT: No, don't lead him.

MR. FOX: Q. Where was this built?

A. A little to the footwall.

Q. Where did this chute or this slide chute point in this particular place?

A. As shown there, to the hole.

Q. To the hole. I will ask you whether or not the position of this slide chute indicated the position of the hole?

THE COURT: That would be a conclusion for the jury. You may ask him whether or not this model correctly shows the relation of the slide chute as shown thereon to the hole in the chute.

MR. FOX: Yes, answer that question.

A. It does.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. PLUMMER:

Q. How long was it after the accident when you got there, or after they got the man out, when you got there?

A. I was there before they took the man out.

Q. What time did you get there?

A. About a quarter past twelve.

Q. Then after the accident happened at half past elveven it would be three-quarters of an hour?

A. Yes.

Q. You don't know then what condition the chute was in when the accident actually happened, do you?

MR. FOX: Is there any contention on that, counsel?

MR. PLUMMER: Well, there might have been. It might have been shoved over.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. What is the fact as to whether or not those chutes are nailed down, those slide chutes?

A. They are.

Q. And what sort of nails are used for the purpose of nailing them down?

A. Sixty penny spike.

Q. What is the size of that slide chute timber?

A. Three inch lagging.

Q. Three inch lagging?

A. Yes.

MR. FOX: That is all.

MR. PLUMMER: That is all.

D. G. DONAHU, Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Donahu, state your name.

A. D. G. Donahu.

Q. Where do you reside?

A. Wallace, Idaho.

Q. What is your business?

A. Mining and safety engineer.

Q. Mining and safety engineer?

A. Yes sir.

Q. What position do you occupy with the Federal Mining & Smelting Company?

A. Safety engineer.

Q. Safety engineer?

A. Yes.

Q. Do you occupy any other position with them?

A. I make settlements in cases of personal injury.

Q. Now, what are your duties as safety engineer for the company?

A. To make inspection of the mine workings.

Q. How often do you make such inspections?

A. About twice a month.

A. Are you familiar with the mining conditions existing in the Morning mine?

A. I am.

Q. Are you familiar with the position of these slide chutes that the muckers build, with reference to the holes to which they lead?

A. I am.

Q. And state how they are usually laid by the muckers?

A. They are usually built so that the center of the slide chute is usually opposite the hole in the chute, the center of the slide is usually opposite the hole in the chute.

Q. I will ask you to state whether or not the presence of a slide chute indicates to the miner and the workmen who are passing by those places, the position of the hole, irrespective of whether it is open or covered with muck?

MR. PLUMMER: We object to that as simply calling for his conclusion.

THE COURT: Sustained.

MR. FOX: You may inquire.

CROSS EXAMINATION by
MR. PLUMMER:

Q. You are the claim agent for the company, are you?

A. I don't know whether you would call that my position or not.

Q. You assist in preparing the defenses in these cases, do you not?

A. I do not. I assist to the extent that any information I have I turn it over to the attorneys.

Q. I mean you look up the evidence and present it to the attorneys?

A. I generally try to secure every witness that is available.

Q. You don't know how this particular chute was at that time, do you?

A. No, I didn't see that chute.

MR. PLUMMER: That is all.

MR. FOX: That is all, Mr. Donahu.

EMIL CLAWSON, Heretofore sworn as a witness on behalf of the Defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Clawson, you have been sworn and have testified here before?

A. Yes sir.

Q. Mr. Clawson, at this particular place where the plaintiff was injured, I understand there was a slide chute, is that correct?

A. Yes sir.

Q. And with reference to the way he was going from the No. 7 or No. 8 chute to No. 6 chute, he was working say on the seven chute, and was walking towards six chute, would the slide be on the far side of the hole or the near side of the hole?

MR. PLUMMER: We object to that unless he saw it at that time.

MR. FOX: He was there. He took him out.

THE COURT: State how it was.

A. It was on the far side of the chute.

MR. FOX: As represented in this model here?

A. Yes sir.

Q. Assuming that the plaintiff was coming from this direction?

A. Yes sir.

Q. In other words, No. 8 chute would be five sets over this way?

A. Fifty feet over that way.

Q. And No. 7 would be 25 foot over this way?

A. Yes sir.

Q. It would be about five sets?

A. Yes sir.

Q. How do the muckers build the chutes with reference to the holes into which they lead? I am referring to these slide chutes.

A. How they built the slide chutes?

Q. Yes. Do they put the slide chutes with reference to the hole?

A. So that they point down to the hole.

Q. State whether or not the position of the slide chute is an indication as to where the hole is?

A. Yes sir.

MR. FOX: That is all.

CROSS EXAMINATION by
MR. PLUMMER:

Q. It is a whole lot wider than the hole, isn't it?

A. Yes sir.

Q. The slide chute is a whole lot wider than the hole?

A. Yes.

Q. Do you know how long it had been since the slide chute had been used for letting ore down?

A. I do not.

Q. Do you know whether it was used even a month before that?

A. I couldn't say what day,—what time it had been used, no.

Q. Then, for instance, suppose this slide chute was situated so that it was shoved over near the edge of this post, or up against this post, for instance, leaving a space through here, a little space, a number of feet, that would indicate, would it, that the hole was over here?

A. Yes.

Q. And if it happened to be that the hole was over on the footwall, that the position of the chute wouldn't indicate where the hole actually was, would it?

A. When the chute is over on that side it would show that the hole wouldn't be over on this side, because the muck couldn't get over there.

Q. Suppose the slide had been over on the hanging wall side?

A. Yes.

Q. Right up against the post?

A. Yes.

Q. That would indicate that the hole was more near the hanging wall than the footwall, wouldn't it?

A. It would, yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. This particular slide chute, where was that built, with reference to the hanging or the footwall?

A. It was built over to the footwall side.

Q. And where was the hole in this particular case?

A. It was close to the footwall side.

MR. FOX: I think that is all.

RE-CROSS EXAMINATION by
MR. PLUMMER:

Q. Did you build this slide chute?

A. No sir.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Did you make this model, Mr. Clawson?

A. I did.

Q. I will ask you whether or not this model is a representation of the conditions as you found them after the accident?

A. That is all I had to go by.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. PLUMMER:

Q. You don't mean to say that this is an exact representation as to the measurements, do you, of that stope?

A. As near as I can remember, yes sir.

Q. What is the distance between the floors in that mine?

A. Nine feet.

Q. Nine feet?

A. Yes.

Q. And would this be the proper height, considering the width of the stope here?

A. Yes sir.

Q. The stope was six feet, you say?

A. About six feet.

Q. And this would be nine feet?

A. Nine feet to the top of the floor.

Q. And also the length of the hole here, three feet?

A. Yes sir.

Q. Three feet long?

A. Yes sir, that is, inside the chute.

Q. How far is it between the posts running lengthwise of the stope?

A. Five foot, center to center.

Q. If you have got it in this model that this hole here is the full length of the space between the two posts, it is, isn't it?

A. Yes, it is a five foot lagging taken out of there.

Q. Then the length of this hole is about five feet, is it?

A. It is.

Q. And how wide did you say the chute is, the slide chute, I mean?

A. The slide chute?

Q. Yes.

A. I would judge it was about two foot and a half.

Q. It didn't occupy then near all the space between the posts, did it?

A. Not quite, no.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. When you say this hole was three feet long, what did you mean?

A. I mean there is a five foot lagging taken out, and the chute chambers take up a foot, and there is a foot chamber on each side nailed right on to the cap, six inches.

Q. And how about the cap here?

A. The cap is generally a twelve inch cap, twelve to fourteen inches in diameter.

Q. So that would take up another foot of the five foot hole in length.

A. Yes.

Q. When you speak of three feet in length, you mean the width of the chute?

A. The inside measure of the chute.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. PLUMMER:

Q. When did you make this model, Mr. Clawson?

A. I made that last week.

Q. Last week?

A. Yes.

Q. Has that part of the mine all been filled up now?

A. I suppose so.

Q. How long ago?

A. I don't know.

Q. Then you just made it from memory, nearly eleven months ago?

A. Yes sir.

Q. That is, from the way you observed it eleven months before you made it?

A. Yes sir.

Q. Under the direction of Mr. Brown?

A. No sir.

Q. Who directed you to make it?

A. My foreman told me to make it.

Q. Your foreman?

A. My foreman, yes.

MR. PLUMMER: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. Who is your foreman?

A. Dave Hutton.

Q. He is the foreman in the carpenter shop?

A. Yes sir.

MR. FOX: That is all.

FRANK L. BOYD, Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. State your name in full.

A. Frank L. Boyd.

Q. And you live at Mullan?

A. Yes sir.

Q. You are employed by the Federal Mining & Smelting Company in the Morning mine?

A. Yes sir.

Q. Were you at the place where Mr. Dalo fell down the chute the day he fell down the chute?

A. I went up there when they were taking him out, yes sir.

Q. Did you see a slide chute there on one side?

A. Yes sir.

Q. I will ask you whether or not it was approximately in the position as represented on this model.

A. Yes sir.

Q. Where do the muckers build these slide chutes, with reference to the holes into which the muck is intended to be slid?

A. So that the hole will be right in front of the slide, so the muck runs off the slide into the chute.

Q. What is the fact as to whether or not a mucker can tell the approximate position of a hole by the position of the slide chute?

MR. PLUMMER: That is a conclusion, if Your Honor please. We object to that.

THE COURT: Oh yes. The jury can say that just as well as the witness can. The conditions there are abvious, if they believe that this is a correct model.

MR. FOX: Q. What is the fact as to whether or not the center of the opening is found in the center of the slide chute?

A. As near as possible.

MR. FOX: Yes. You may inquire.

CROSS EXAMINATION by
MR. PLUMMER:

Q. You were the motorman, weren't you?

A. Yes sir.

Q. Working down on the lower floor somewhere?

A. My duties were on the main level.

Q. Did you run the train of cars that hauled the ore out?

A. Yes sir.

Q. That was your exclusive duty, wasn't it?

A. Yes sir.

Q. How long had you been engaged in that work when this accident occurred?

A. I can't tell you exactly, but close to a year and a half anyway, as motorman.

Q. That is all the kind of work you have done?

A. I had worked at stope work some.

Q. Before that time?

A. Yes sir.

Q. During the time you worked there as motorman you didn't pay any attention as to how they constructed the different chutes in that mine, did you, just how close they would be to some particular thing?

A. Only when I would go up into the stope for something.

Q. And they have a good many slide chutes there, don't they?

A. Yes sir.

Q. They have one each twenty-five feet, don't they?

A. Yes sir.

Q. You never noticed all these different slide chutes down through that whole mine, to see how they were built, did you?

MR. FOX: He never said he did.

MR. PLUMMER: Don't caution him.

A. There is not a slide chute at every chute.

MR. PLUMMER: Q. How many slide chutes are there in that mine?

A. That depends on how many chutes they are working.

Q. How many were there in the mine when you were there?

A. I couldn't say.

Q. Then you don't know how all of them were constructed or situated, do you?

A. No sir, not all of them.

Q. That wasn't your business, was it?

A. No sir.

MR. PLUMMER: That is all.

MR. FOX: That is all.

W. C. LEHTI, Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. State your full name, please.

A. W. C. Lehti.

Q. You are working for the Federal Mining & Smelting Company, aren't you?

A. Yes sir.

Q. Up at the Morning mine?

A. Yes sir.

Q. Were you at the place of the accident, where Mr. Dalo fell down in the chute?

A. Yes sir.

Q. Were you working in that vicinity?

A. No. I was working on the west end.

Q. How far from where he was?

A. 1600 chute, around there, on both sides, we kept working.

Q. On what floor were you working?

A. I think it was the ninth floor.

Q. That would be two floors below where he was working?

A. I don't remember what floor he was working on.

Q. What were you doing?

A. I was timber helper.

Q. Are you familiar with the manner in which the slide chutes are built?

A. Yes.

Q. Where are they built with reference to the hole that leads into this main chute?

A. They are built so the muck will run down into this main chute, even with the hole on top of the main chute.

Q. What is the fact as to whether or not approximately the center of the hole, the center line of the hole is situated usually at the center of these chutes?

A. So the muck will run straight into them, so it won't hang up.

Q. I will ask you whether or not you observed a slide chute in front of this hole, as indicated on this model, at the place where the plaintiff fell in.

A. Yes sir, about the same as it is there.

Q. Were you there at the time they were trying to get him out?

A. Yes sir.

Q. You helped get him out?

A. I helped pull him out.

MR. FOX: That is all.

CROSS EXAMINATION by
MR. PLUMMER:

Q. You were a timber helper?

A. Yes sir.

Q. You had nothing to do with building the slide chutes?

A. No sir, I didn't.

Q. And you never used the slide chutes themselves, did you?

A. No sir.

Q. You didn't pay any attention to them, did you?

A. No, not very much.

Q. You say they are usually built so that the center of the slide chutes, so the slide chute would let the ore into the hole, so that it wouldn't hang up. Was that the reason of it?

A. Yes sir.

Q. And when they did hang up it was an indication that it hadn't slid down right to the center, wasn't it?

MR. FOX: I object to that as pure speculation.

MR. PLUMMER: That is cross examination, if Your Honor please.

THE COURT: Objection sustained.

MR. PLUMMER: That is all.

MR. FOX: That is all. We rest.

MR. PLUMMER: Mr. Dalo, will you take the stand.

ANGELO DALO: Heretofore duly sworn as a witness in his own behalf, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. PLUMMER:

Q. Mr. Dalo, in that stope where you got hurt was there any boards or floor along next to the hanging wall, or next to the footwall, like it appears here?

A. It was full of muck.

Q. That was all full of muck?

A. Yes.

Q. How high?

A. A man that come by there can't pass through at all. These posts here was close to the wall.

Q. How was that slide chute, how was it situated with reference to the—

A. I don't know.

Q. With reference to that hole?

A. I don't know.

Q. Which side did you pass through?

A. I come in this way, right through there, I got in by here, I got to come in here, cross here, and go in here; I got to cross here some place to come by there.

Q. No other place to get by?

A. No.

MR. PLUMMER: Take the witness.

MR. FOX: No questions.

MR. PLUMMER: That is all.

MR. FOX: Inasmuch as that question has been opened up, I assume we have a right to sur-rebuttal. That is the first evidence that has been introduced here that there was no room to get by that chute.

MR. PLUMMER: He testified to it in the first place.

MR. FOX: No, he did not. It is really not rebuttal testimony; it is testimony in chief.

THE COURT: You may call your witnesses.

MR. FOX: All right. Mr. Brown, will you take the stand.

JOHN C. BROWN, Heretofore duly sworn on behalf of the Defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Mr. Brown, will you tell the jury what the fact is as to whether or not you could get by that slide on the hanging wall side, that would be on the side nearest to the jury as you look at the model?

A. Yes sir, you could.

Q. And when you came up there, how did you come, how did you get to the hole?

A. I came through on the hanging side.

Q. Now, Mr. Brown, what is the fact as to whether or not you could get by behind these posts?

MR. PLUMMER: That was brought out when I asked him that before.

MR. FOX: No. You asked him whether or not there was flooring here, and he said there was. You

didn't ask him whether or not he could get by, and nobody else did.

THE COURT: He may answer.

A. You could.

MR. FOX: Q. Will you just come here and indicate to the jury how you could get by there. Supposing that there was muck up here, a couple or three feet?

A. You could walk right along here and come right between this slide and that post, or behind that post.

Q. How about this post here,—could you get by here?

A. You could get by there, yes.

Q. You mean between the wall and the post?

A. Yes.

Q. Now, what is the fact as to whether or not you could get by this post here, that is, the post on the footwall side nearest the chute?

A. You could not.

Q. You could not?

A. No.

MR. FOX: That is all.

CROSS EXAMINATION by
MR. PLUMMER:

Q. If this slide had been shoved clear over to that post, instead of this space that you show on this model, then he couldn't get through here at all, could he?

A. He could climb over there.

Q. I know he could climb over, but outside of

climbing up on to the slide chute, he couldn't get by there, could he?

A. Go behind the post.

Q. I say he couldn't get between the post and the slide chute without doing that, could he?

MR. PLUMMER: That is all.

MR. FOX: That is all.

EMIL CLAWSON, A witness heretofore duly sworn, on behalf of the Defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Just tell the jury whether or not a person coming from No. 7 or 8 chute, and going to and past No. 6 chute could get by on the hanging wall side?

A. Yes.

Q. How would be get by on that day?

A. Come in here, coming from that side here, and walk right straight through.

Q. He could get by between the chute and the timber?

A. He could squeeze by.

Q. Did you notice whether or not you could get by between the timber and the wall?

A. I do not know.

Q. You do not know?

A. I don't remember.

Q. Do you know whether or not he could get by on the footwall side?

A. He couldn't.

MR. FOX: That is all.

CROSS EXAMINATION by
MR. PLUMMER:

Q. You say he could or couldn't?

A. He couldn't.

MR. PLUMMER: No questions.

MR. FOX: That is all.

FRANK L. BOYD, A witness heretofore duly sworn on behalf of the Defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Do you know whether or not on the day you went there to this accident, a person could get by the slide chute on the hanging wall side?

A. He could, yes, on the hanging wall side.

Q. How about on the footwall side?

A. I don't know. I wasn't over there.

Q. Which way did you come?

A. I came in from No. 3, this way, and come right up to this corner here, and stood right here.

Q. You stood right in between the slide and this timber?

A. I did.

Q. And the post?

A. I did.

MR. FOX: That is all.

MR. PLUMMER: That is all.

W. C. LEHTI, A witness heretofore duly sworn on behalf of the Defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by
MR. FOX:

Q. Which way did you come up here?

A. I came in from the west.

Q. From the west side?

A. Yes.

Q. Do you know whether or not a person walking from No. 7 chute to No. 6 chute could pass between the posts and the chute on the hanging wall side?

A. Yes sir.

Q. He could?

A. Yes.

Q. Did you go through there?

A. No, not at the time, but before and after I did.

Q. State whether or not you could get through on the hanging wall side?

A. No sir.

MR. FOX: That is all.

MR. PLUMMER: That is all.

MR. FOX: That is all.

MR. PLUMMER: That is all.

THE COURT: I will excuse you, gentlemen, until 7 o'clock. The other jurors will be excused until 8 o'clock.

An adjournment was thereupon accordingly taken until 7 o'clock P. M., Friday, November 30, 1917.

7 P. M., Friday, November 30th, 1917.

(The case was thereupon argued to the jury by respective counsel.)

THE COURT: Gentlemen of the jury, this case is similar in its legal aspects to cases which have

been tried heretofore, and I think perhaps all of you have sat upon one or the other of the cases, but it becomes necessary for me to re-state the principles of law and apply them to the facts in this case, even though you may think in some respects such re-statement is repetitious, and that you already know the law.

The plaintiff comes into court alleging that while he was in the employ of the defendant company, and in the performance of his duties under his employment, he fell into an ore chute which was in a dangerous condition, as a result of the carelessness of the defendant company, and, as a consequence, suffered certain injuries. The general rule is that one who is employed by another, and who, while engaged in such employment, suffers an injury, which is not the result of his carelessness, and the risk of which he did not take, he may recover from his employer a reasonable compensation to cover his loss or damage. Generally the first inquiry, and here the first inquiry, touches the question whether or not the defendant company was negligent substantially in the manner and form alleged in the complaint. Generally speaking, one is negligent who does not, under the circumstances,, use the care which an ordinarily prudent person, with due regard for the safety of another, would have used under those circumstances, or who has done something which, under like circumstances, an ordinarily prudent person, with due regard for the safety of another, would not have done. Now, that is a general definition of carelessness or negligence

which is applicable both to the plaintiff in this case, or to the plaintiff's conduct, and to the defendant or its conduct; that is, if the plaintiff failed to use such care in looking out for his own safety, in taking care of himself, then he would be guilty of contributory negligence, if such want of care contributed to the injury. Upon the other hand, if the defendant company failed to exercise that degree of care, then it would be chargeable with negligence, and if such negligence contributed to the injury complained of, it would be held responsible. More specifically in this case it is charged that the defendant was negligent in that it failed to perform the obligations which every employer owes to its employee, and that is, to use reasonable care to see that the place where the workman is called upon to perform his duties is in a reasonably safe condition. I say that is the duty of every employer under all circumstances, the duty to use reasonable care to see that the place where the work is carried on is in a reasonably safe condition. That obligation implies the duty to see that the place is reasonably safe in the first place, and then, by the exercise of reasonable care, in the way of inspection and repair, to see that the place is kept or maintained in a reasonably safe condition. Now, that general principle of inspection and maintenance of a place in a reasonably safe condition is subject to this exception, which I think will at once appeal to your reason: Such dangers as arise, or such dangerous conditions as occur in the course of the work, as a result of the work itself, cannot always be provided

against or at once corrected. Take, as a concrete illustration, suppose that this defendant mining company, for instance, had set the plaintiff here to work in shoveling a high pile of muck or ore, as it is called, and, as he shoveled from the floor the ore upon the side toward him became steeper and steeper all the time, until all at once some of that which was at the top toppled over and fell upon him; it would not have been the duty of the defendant company in a case of that kind to have someone standing around to see that the pile of muck was kept in a safe condition. The danger necessarily arose as the work progressed, and it was the duty of the workman himself to look out for that danger which his own work created. So that, if you set someone to work in tearing down an old building upon your farm, or wherever you had property, the building might be perfectly safe when you set the man to work to tear it down, but as he progressed in the work of razing the building, or tearing it down, I mean, it might become dangerous. That part of it which still stood there, sometime in the course of the work, might become perilous. There might be danger of its falling over and injuring him unless he looked out for himself. I use those merely as illustrations to direct your attention to the principle that while it is the general duty of the employer to use reasonable care in putting and maintaining the place where the work is carried on in a reasonably safe condition, it is subject to this exceeption. But it is the duty, as I have already stated, of the employer, and was the duty of the defendant in this

case, by a reasonable system of carrying on this work and by reasonable inspection from time to time to discover and to eliminate dangers which were unnecessary, and were reasonably avoidable. That is especially true where work is being carried on at different places, by different employees, so that there is no direct connection between the work of one and that of another. Now, in the light of what I have said to you, you will consider all of the circumstances in evidence in this case, and say whether or not the conduct of the defendant company measures up to the general standard to which I have directed your attention; that is to say, whether, in the light of all these circumstances, the defendant company exercised the degree of care which an ordinarily prudent employer would, under the circumstances, have exercised, in order to anticipate and prevent such an injury. Now, if you find that it was not negligent, that it did meet this obligation, and it did measure up to this standard of duty, of course it will be unnecessary for you to go further, for the plaintiff could not recover. If, upon the other hand, you find that the defendant measurably failed in the performance of this duty, the next question is as to whether or not the plaintiff himself was guilty of negligence which contributed to the accident in which he was injured, for, as counsel have both stated to you in the argument, even if the defendant was negligent, if also the plaintiff was negligent, and his negligence contributed to the injury, he could not recover, and, as I have said to you, you will measure his conduct by

the same general standard. Did he, under all the circumstances of the case, use that degree of care which an ordinarily prudent person, under like circumstances, would have used to protect himself against the danger. And in that connection you may consider his age, his apparent intelligence or want of intelligence, his experience in mining, underground mining, his experience on this particular level in this mine and on this floor, his knowledge or lack of knowledge of the customs and rules of the company, his knowledge or want of knowledge of the manner in which these chutes were built and operated, his knowledge or want of knowledge of whether or not ore was sometimes hung up in them, as it is put, his knowledge or want of knowledge of the condition of the down-chute there, and also of the incline, to his knowledge or want of knowledge as to whether or not the incline chute indicated the place where the down-chute opened into the floor, and his knowledge or want of knowledge of the custom of the company touching the point as to whether or not they did send a man when the ore was drawn to see whether or not it hung up at the top of the chute, and all other circumstances in evidence, and then say whether or not he acted reasonably. Did he take reasonable care to see that he did not suffer danger, such as resulted in precipitating him in the chute? If you find that he was wanting in care, and that his own negligence contributed to the accident, as I have already indicated to you, you must find for the defendant.

There is the other defense, to which again both counsel have referred, that is, of the assumption of risk. As you have been told by both sides, there are some dangers necessarily incident to carrying on underground mining. That is manifestly true, and both sides admit that that is true, so that when a man goes underground in one of these mines he assumes the risk, that is, he impliedly says to his employer that he will hold the employer harmless as against all dangers which are necessarily incident to carrying on such mining operations where they are carried on in a reasonably careful and prudent manner. He does not ordinarily assume the risk of any danger resulting from the carelessness of his employer. But there is an exception to that last statement. He does assume the risks of all dangers, even though they are due to the carelessness of his employer, and here, to make the statement more concrete, the plaintiff did assume the risk of all danger or hazard resulting from carelessness of the defendant company, if there was any carelessness, of which he the plaintiff had knowledge, and which he was able to appreciate. To illustrate this, suppose you, as farmers,—some of you, I think, are farmers,—put an axe in the hands of your hired man, the handle of which is broken, and you do not call his attention to it, and the break is of such character that he might not notice it, now, if in good faith he takes that axe, not knowing that the handle is broken or injured, and thus weakened, and in using it in the ordinary way he injures himself, he could hold you responsible for

the result of the accident. If, upon the other hand, you put such an axe in his hands, and call his attention to the break, and he is of sufficient age and intelligence to be able to appreciate the danger, the risk or peril therefrom, or if he, without your calling his attention to it, sees the break himself and is able to appreciate the risk from it, and still goes on and uses it, he impliedly says to you, "I will take the chances of using it; I won't hold you responsible." So in the case of the plaintiff in this action, if he knew of the manner in which the mining operations were carried on there, if he knew that the ore was being drawn in the manner in which it was, and that there was no inspection for the purpose of seeing whether or not the ore was hung up, and if he knew that the ore was being drawn from these chutes from time to time, and knew of the existence of this particular chute, and was able to appreciate the danger incident to the possibility of the ore being hung up there, and still he went on in the employment of the defendant, and walked back and forth over this pile of muck, knowing and being able to appreciate that it might be hung up, and that he might be precipitated into the chute below, then he would have assumed the risk, and could not hold the defendant responsible therefore. Now, assuming that you may possibly find the defendant was negligent, and that such negligence resulted in the injury, and that the plaintiff was not guilty of any contributory negligence, and did not assume the risk, then you should find for the plaintiff. And the next question

for you to determine will be the amount of the damages to be awarded to him. The statute in such cases fixes no precise standard. The matter is left to the good sense and fairness of twelve jurymen, and it is for you to determine, but to determine in the light of the evidence, what would be a reasonable compensation to make to the plaintiff for the loss which he has sustained; and in considering that loss you should give consideration to the pain, if any, which he has suffered, and the pain, if any, which he will suffer, the impairment of his physical powers, his loss of time, and, of course, you take into consideration the question whether or not such impairment of his powers as he has suffered is likely to be permanent or only temporary, all for the purpose of reasonably compensating him for his pain and suffering, and for his loss by reason of such impairment of his powers.

The burden of proof, gentlemen, is always upon the one who takes the affirmative, and in this case the burden was upon the plaintiff of showing how he was injured, and that such injury was due to the negligence of the defendant company, and that by a preponderance of the evidence, not necessarily by the greater number of witnesses, but by evidence which convinces you that it is of greater weight than the evidence opposing it. Upon the other hand, as to contributory negligence, and the defense of assumption of risk, the burden is upon the defendant, and likewise as to the two defenses, it must, by a preponderance of the evidence, establish the defense, if you recognize it, and the same rule of preponderance

applies as in the case of preponderance for the plaintiff.

You being the sole judges of the issues of fact, it is also your right and your duty to pass upon the credibility of the witnesses and the weight to be given to their testimony. You should bring to bear the rules which you have learned, consciously or unconsciously, in the ordinary practical affairs of life, and undertake to determine upon which side of an issue the truth lies. As I have already stated to you, there is no particular mystery about an injury of this sort in court; it is a good deal the same as it is outside, and you will judge of the credibility of the witnesses, of their truthfulness, and the weight to be given to their testimony, in a good deal the same manner as you would if you were hearing testimony or statements out of court. Men are influenced largely by the same motives, and their testimony is subject largely to the same conditions in court as it is out of court.

All of you gentlemen must agree upon a verdict. Two forms have been prepared, one to enable you to find for the defendant, without anything except the signature of the foreman, and in the other is left a blank for the insertion of the amount which you award, if you find in favor of the plaintiff. You will make the insertion, and your foreman will sign it, if you use that form.

Let the bailiff be sworn.

(The bailiff was thereupon sworn.)

MR. FOX: If Your Honor please, I would like to take one or two exceptions.

THE COURT: Yes. If there is any suggestion of affirmative matter, perhaps you might suggest it now.

MR. FOX: I will do that by way of handing a memorandum up to Your Honor. I think possibly Your Honor forgot to instruct about that, if you intended to do it.

THE COURT: I think the general instruction that I have given is as far as I should go on that particular point.

MR. FOX: Would Your Honor allow us an exception to the refusal?

THE COURT: Yes. You may have an exception to both of these, insofar as they are not covered. I think in the main they are covered by the general instruction. If you will put these together and number them, I will give you an exception, Mr. Fox.

(The jury thereupon retired from the court room.)

THE COURT: Do you desire to take any exceptions, Mr. Plummer?

MR. PLUMMER: No, Your Honor.

THE COURT: You numbered those one and two?

MR. FOX: Yes, one and two.

INSTRUCTIONS REQUESTED BY DEFENDANT.

No. 1.

Gentlemen of the jury, the plaintiff in this case does not claim that the defendant Mining Company was negligent in not warning the plaintiff of the possibility of chutes hanging up above the floor, and you are instructed that failure to so warn or instruct

is not negligence which caused or contributed to the accident, and therefore the plaintiff cannot claim a recovery against the defendant in this case because of such failure.

Filed Nov. 30th, 1917.

W. D. McReynolds, Clerk.

INSTRUCTION REQUESTED BY DEFENDANT.

No. 2.

You are instructed that before you can find defendant guilty of negligence in failing to discover and remove the danger which resulted in plaintiff's accident and injuries, you must first find that, in view of all the circumstances in the case, sufficient time had elapsed before the accident to enable the defendant in the exercise of ordinary care to have discovered and removed the danger.

Filed Nov. 30, 1917.

W. D. McReynolds, Clerk.

THE COURT: Give the defendant exceptions to the refusal of the Court to give requested instructions Nos. 1 and 2.

MR. FOX: I think that is all. The record might be fixed up now to show the admission of this exhibit.

THE COURT: Yes. It was exhibited to the jury. That is, the model,—Exhibit No. 2.

MR. FOX: And also that our motion for a directed verdict was deemed again to have been made after all of the evidence was closed, and overruled, and an exception allowed to the ruling?

THE COURT: Yes. That is, the motion you made

will be deemed to have been made after the evidence closed.

MR. FOX: Yes, after the evidence closed, and was overruled, and an exception?

THE COURT: Yes. There was one matter that I called counsel's attention to, because of my knowledge of certain conditions. You have stated that you may desire to have reviewed my ruling as to the competency or admissibility of the testimony of a certain physician.

MR. FOX: Yes.

THE COURT: The question is of interest to me, and I may say to you that it is possible that you could not have a ruling upon that without an offer of proof.

MR. FOX: Yes, I thought of that.

THE COURT: I am not very much in sympathy with the rule requiring an offer of proof, but I am not sure just what view the appellate court will take upon that, and you may make an offer now, so as to make it a matter of record—you may make the offer.

MR. PLUMMER: I want to object to the offer being made at this time, inasmuch as counsel didn't make it at the proper time, and I don't think it is proper to make it at this time, for the purpose of securing a decision upon a mooted question.

THE COURT: I will say that had counsel proffered at the time to make an offer, I should have declined to permit the offer to be made, as has been the general practice in this court. I think it is a waste of time to make such offers.

MR. FOX: I will make the offer now, if Your Honor please, as I would have made it. The defend-

ant offers to prove by the witness Dr. F. W. Ross that the plaintiff, prior to the happening of the accident and injury complained of in plaintiff's complaint, and prior to the time that the plaintiff went to work for the Federal Mining & Smelting Company, and while the plaintiff was still in the employ of another mining company in the Coeur d'Alenes, he came to him, suffering from a hernia on the left side, at the same place in which he now complains of a hernia, and that the doctor prescribed, and procured for him a truss to relieve him from that condition.

MR. PLUMMER: Without consenting or appearing to consent that the offer be made at all, without waiving my rights, of course, on that subject—

THE COURT: Yes.

MR. PLUMMER: I object, on the ground that it is incompetent, irrelevant and immaterial, and any communication of that kind would be privileged under the laws of this state.

THE COURT: Of course the objection to the offer is sustained, just the same as the original question was.

MR. FOX: If Your Honor please, the bailiff may take in this exhibit, No. 2, the model?

MR. PLUMMER: If he can carry it.

THE COURT: Might it not be just as well to wait and see whether they want it?

MR. FOX: In case they want it, I mean.

THE COURT: I think they have it pretty well in mind.

MR. PLUMMER: I think so.

In the District Court of the United States for the District of Idaho, Northern Division.

No. 691.

ANGELO DALO, *Plaintiff,*

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation, *Defendant.*

VERDICT.

We, the jury in the above entitled cause, find for the plaintiff, and assess his damages at $5000.00.

W. H. BELL, Foreman.

December 1st, 1917.

MR. FOX: I assume, Your Honor, that you will allow us thirty days to prepare the bill of exceptions, etc.?

MR. PLUMMER: No objections.

THE COURT: Very well.

Now comes the defendant Federal Mining & Smelting Company and serves, presents and files the foregoing as and for a full, true and correct bill of exceptions of all rulings made at and during the course of trial of the above entitled action in the above entitled court, which said rulings were duly objected and excepted to by the defendant upon the grounds mentioned therein, said exceptions being accompanied with the whole evidence in said case, being the evidence necessary to explain the said exceptions and each and every one of them, and their, and each of their relation to the case and to show that the said rulings, and, each, and every of them tended to prejudice the rights of said defendant.

Dated at Wallace, Idaho, this 4th day of February, A. D. 1918.

FEATHERSTONE & FOX,
Attorneys for Defendant.

In the District Court of the United States for the District of Idaho, Northern Division.

No. 691.

ANGELO DALO, *Plaintiff,*

vs.

FEDERAL MINING & SMELTING COMPANY, a Corporation, *Defendant.*

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, Frank S. Deitrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, the judge who presided in said court at the trial of the case of Angelo Dalo, plaintiff, vs. Federal Mining & Smelting Company, a corporation, defendant, on the 28th, 29th and 30th days of November, 1917, do hereby certify that the foregoing bill of exceptions was handed me by the Clerk of the Court on the 13th day of February, 1918, for settlement, and it appearing to me that the same has been within the time allowed by law, and within the time allowed by an order of this Court extending such time, served upon attorneys for the plaintiff together with notice that the same would be presented for settlement and the attorneys for the plaintiff having made no objection to the settlement, and having offered no amendments thereto; and it appearing to

me that the said bill of exceptions is correct and contains in substance all of the evidence offered at the trial of said cause, and all the exceptions taken by the defendant to the admission of testimony, and to the giving and refusal to give instructions to the jury; the said bill of exceptions is hereby signed, sealed, settled and allowed as and for a full, true and correct bill of exceptions in this cause, and I hereby certify that the same contains all of the evidence produced upon the trial of said cause.

Dated at Boise, Idaho, this 13th day of February, A. D. 1918.

FRANK S. DIETRICH,
Judge.

Service of the within and foregoing bill of exceptions by receipt of a true copy thereof is hereby acknowledged this 4th day of February, A. D. 1918.

PLUMMER & LAVIN,
THERRETT TOWLES,
Attorneys for Plaintiff.

Endorsed: Filed Feby. 14, 1918.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)
No. 691.

PETITION FOR WRIT OF ERROR.

Comes now Federal Mining & Smelting Company, a corporation, defendant herein, and says that on or about the thirtieth day of November, A. D. 1917, this Court entered judgment herein in favor of the plain-

tiff and against the defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Residence and Postoffice Address, Wallace, Idaho.

Filed Feb. 11, 1918.

W. D. McReynolds (Clerk).

(Title of Court and Cause.)

No. 691.

ASSIGNMENTS OF ERROR.

1.

The Court erred in denying defendant's motion for non-suit made at the close of plaintiff's evidence, because the evidence adduced by the plaintiff was insufficient in the following particulars:

(a) The evidence did not disclose that the injuries complained of by the plaintiff were sustained by reason of any carelessness or negligence on the part of the defendant which was either the proxi-

mate cause of said injuries or contributed in any way thereto.

(b) The evidence disclosed that the injuries suffered by the plaintiff were the result of his own negligence and contributory negligence.

(c) The evidence disclosed that the injuries suffered by plaintiff were sustained by reason of a risk which was incident to his employment, of which the plaintiff was fully informed and which he assumed.

(d) The evidence disclosed that if the injuries suffered by plaintiff were sustained by reason of the negligence of the chute tender in failing to clear the top of the chute, then the plaintiff was injured by reason of the negligence of a fellow servant.

2.

The Court erred in overruling the same motion renewed by defendant upon the close of all the evidence offered in the case.

3.

The Court erred in refusing to give Instruction No. 1 requested by the defendant as follows, to-wit:

> "Gentlemen of the jury the plaintiff in this case does not claim that the defendant Mining Company was negligent in not warning the plaintiff of the possibility of chutes hanging up above the floor and you are instructed that failure to so warn or instruct is not negligence which caused or contributed to the accident, and therefore the palintiff cannot claim a recovery against the defendant in this case because of such failure."

4.

The Court erred in refusing to give Instruction No. 2 requested by the defendant as follows, to-wit:

> "You are instructed that before you can find defendant guilty of negligence in failure to discover and remove the danger which resulted in plaintiff's accident and injuries, you must first find that in view of all of the circumstances of the case sufficient time had elapsed before the accident to enable the defendant in the exercise of ordinary care to have discovered and removed the danger."

To which rulings of the Court the defendant then and there by counsel duly excepted, which exceptions were allowed by the Court, and the defendant now assigns the said rulings of the Court as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE VERDICT OF THE JURY AND THE JUDGMENT RENDERED THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of, or contributed in any manner to the injury of the plaintiff. The evidence shows without contradiction that the floor of the stope in defendant's mine over which plaintiff was passing at the time he sustained the injury complained of, was constructed in the manner ordinarily used for such

structures, and was in as good and safe condition as such a structure can be made. The twenty-two openings to the chutes in said floor were a necessary part of the structure considering the use to which it was put in order that ore and waste might be shoveled from said floor into the chutes and the said openings, which are always uncovered in operating mines, presented no unusual or unexpected danger to plaintiff in his work.

(b) The evidence shows without contradiction that the plaintiff was negligent and was guilty of contributory negligence in walking directly over the hole or opening in the said floor, of the existence and location of which he was fully informed, and upon which it was not necessary for him to step in going along said floor. The plaintiff was experienced in the work which he was performing when injured and with the obvious danger of stepping upon any of the openings in the floor of said stope over which he was passing, and with the fact that the contents of the chutes might be withdrawn at any moment, without warning, and the act of plaintiff in stepping unnecessarily upon the material accumulated in and over said hole was gross and palpable negligence on his part contributing to the injury received by him.

(c) The evidence shows conclusively that the existence of the twenty-two openings in the floor of the stope, into one of which plaintiff fell, was well known to plaintiff and is a customary mode of construction of the floors in mines of the character of defendant's mine and a necessary and unavoidable

danger of the employment of plaintiff in said mine; that the danger of falling into any of said openings was obvious to plaintiff who was experienced in the work he was performing and well acquainted with defendant's mine, and that plaintiff by accepting and continuing in the employment of defendant assumed the risk of injury in falling into any of said openings.

(d) That the evidence shows without contradiction that if the injury suffered by plaintiff was received by him by reason of the negligence of the chute tender who in withdrawing the contents of the chute on the level below, failed to make sure that the entire contents of the chute had been drawn, then the negligence of the chute tender was the negligence of a fellow servant of the plaintiff for which the defendant is not responsible.

(e) The evidence shows without contradiction that if the injury suffered by plaintiff was incurred by him by reason of the negligence of the muckers on the floor over which the plaintiff was passing in permitting a small pile of muck to accumulate around and over the opening down which plaintiff fell, then the negligence of said muckers was the negligence of fellow servants of the plaintiff for which the defendant is not responsible.

(f) The verdict and judgment are excessive and not warranted by the evidence; it appearing from the evidence without contradiction that the plaintiff is not permanently incapacitated for the performance of manual or other labor, or incapacitated at all.

Comes now the Federal Mining & Smelting Company, the defendant in this action, and files its petition for writ of error, and in connection therewith makes and files the foregoing assignments of error which it avers occurred on the trial of said cause, together with its specifications wherein the evidence is insufficient to sustain the verdict and the judgment rendered thereon, and prays that because of said errors the judgment of the District Court may be reversed.

FEATHERSTONE & FOX,
Attorneys for Defendant.
Postoffice Address, Wallace, Idaho.

Filed Feb. 11, 1918.
W. D. McReynolds (Clerk).

(Title of Court and Cause.)
No. 691.

ORDER ALLOWING WRIT OF ERROR.

This 11th day of February, A. D. 1918, came the defendant Federal Mining & Smelting Company by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration hereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of Six Thousand Dollars which shall operate as a supersedeas bond.

FRANK S. DIETRICH,
Judge of the United States District Court
for the District of Idaho.

Filed Feb. 11, 1918.
W. D. McReynolds (Clerk).

(Title of Court and Cause.)
No. 691.
PRAECIPE FOR TRANSCRIPT.

To W. D. McReynolds, Clerk of the United States District Court, Boise, Idaho..

You will please prepare a transcript in the above entitled cause and include therein:

1. Bond on writ of error, Petition for writ of error, Assignments of error, Order allowing writ of error, Praecipe for transcript, Writ of error, Citation on writ of error and Writ thereof, and all other papers relating to the writ of error.
2. Judgment Roll.
3. Bill of exceptions.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Endorsed, Filed Feb. 11, 1918.
W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 691.

BOND FOR SUPERSEDEAS ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Federal Mining & Smelting Company, a corporation, as principal, and the Aetna Casualty & Surety Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, having complied with all of the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, Angelo Dalo, in the full and just sum of six thousand and no/100 dollars ($6,000.00), to be paid to the said defendant in error, Angelo Dalo, his certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this eleventh day of February, A. D. 1918.

Now, the condition of the foregoing obligation is such that whereas, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in said court between Angelo Dalo as plaintiff and Federal Mining & Smelting Company, a corporation, as defendant, a judgment was rendered against said Federal Mining & Smelting Company upon the verdict of the jury in the sum of five thousand dollars ($5,000.00)

and costs amounting to the further sum of ninety-one dollars and thirty cents ($91.30) and,

Whereas, the said defendant Federal Mining & Smelting Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf and a citation directed to the said plaintiff, Angelo Dalo, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California.

Now, the condition of the above obligation is such that if the Federal Mining & Smelting Company shall prosecute the said writ of error to the effect and answer all damages and costs if it fails to make good the said plea in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as bonds for cost upon appeal and as a supersedeas bond.

FEDERAL MINING & SMELTING COMPANY,
By M. J. Hall, Assistant General Manager,
Principal.

AETNA CASUALTY & SURETY COMPANY,
By Herman J. Rossi, Resident Vice President.
Attest: R. S. Clough, Resident Assistant Secretary,
(Corporate Seal) *Surety.*

State of Idaho,
County of Shoshone,—ss.

On this 11th day of February, 1918, before me a Notary Public, personally appeared Herman J. Rossi

and R. S. Clough, known to me to be the Resident Vice President and Resident Asssistant Secretary, respectively, of the Aetna Casualty and Surety Company, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

A. WYMAN,
Notary Public in and for the State of Idaho,
Residing at Wallace, Idaho.

(N. P. Seal)

Approved, Dietrich, Judge.
Feb. 14, 1918.
Endorsed, Filed Feb. 14, 1918.
W. D. McReynolds, Clerk.
By Pearl E. Zanger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit,—ss.

WRIT OF ERROR.

THE PRESIDENT OF THE UNITED STATES, to the Honorable Judge of the District Court of the United States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Angelo Dalo, plaintiff, and Federal Mining & Smelting Company, a corporation, defendant, a manifest error hath happened to the great damage of the said Federal Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you will send the record and proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 13th day of March next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States, this 11th day of February, A. D. 1918, and in the one hundred and forty-second year of the Independence of the United States of America.

Allowed by

FRANK S. DIETRICH,
United States District Judge.

Attest:

W. D. McREYNOLDS,
(Seal) Clerk of the United States District Court for the District of Idaho.

Filed Feb. 11, 1918.
W. D. McReynolds, Clerk.

In the United States Circuit Court of Appeals for the Ninth District.

The United States of America,
Ninth Judicial District,—ss.

CITATION IN ERROR.

To Angelo Dalo, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, in said Circuit on the 13th day of March next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Federal Mining & Smelting Company is plaintiff in error and you

are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, District Judge of the United States District Court at Boise, Idaho, within said Circuit, this 11th day of February, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

FRANK S. DIETRICH,
United States District Judge.

I hereby this.....day of.....
A. D. 1918, accept personal service of this citation on behalf of Angelo Dalo, defendant in error.

.....

.....
Attorneys for Defendant in Error.

Filed Feb. 11, 1918.
W. D. McReynolds, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,
Clerk.

(Seal)

(Title of Court and Cause.)

No. 691.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 253, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein, upon Writ of Error to the United States Circuit Court of Appeals for the Ninth District, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $361.10, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said court this 28th day of February, 1918.

W. D. McREYNOLDS,

(Seal) Clerk.

3127

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,
vs.
ANGELO DALO,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

FEATHERSTONE & FOX,
Wallace, Idaho,
Attorneys for Plaintiff in Error.

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THERRETT TOWLES,
Wallace, Idaho,
Attorneys for Defendant in Error.

THE WALLACE MINER, WALLACE, IDAHO.

United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,
vs.
ANGELO DALO,
Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

This is a personal injury action, the plaintiff and defendant in error having been injured on the 13th day of January, 1917, by falling into an ore chute in one of the defendant's mines, namely, the Morning Mine, situated near Mullan, in the County of Shoshone, State of Idaho. The facts are comparatively simple. The defendant in error was employed as a mucker, and prior to the accident had been working at No. 7 chute which

was twenty-five feet away from No. 6 into which he fell, this being situated on the 6th floor of the stope above one of the working levels in defendant's mine. The plaintiff had been familiar with the surroundings for some time and it appeared that No. 6 chute had not been drawn for ten days or two weeks. He testified that he had walked over the muck covering the opening into No. 6 chute for a period of ten or twelve days (Tr. p. 62). At the time of the accident the chute extended from the working level to the sixth floor above the same, and the chute was drawn on the morning of the accident about eight thirty and it then appeared that it was hung up from the fourth floor upwards; in other words, for two floors (Tr. p. 85). The plaintiff's witness Milette was the chute tender whose duty it was to knock down chutes in case they were hung up (Tr. p. 79). Milette thereupon proceeded up the manway along the chute and pounded upon the chute with a hammer, which was the usual and proper method of knocking down the chutes, and emptied the same (Tr. p. 81). In order to protect the manway and the men who must use the same it becomes necessary to cover up the manway at the top, that is to say, on the floor from which material is shoveled into the chute, and consequently it is impossible for the chute tender to get through to the floor on which the opening into the chute is situated; and it is not his duty to do so (Tr. p. 82). It is very seldom that a chute hangs up over the hole, that is, that material remains on the top of the opening after the chute is drawn. The plaintiff

testified that he had never known of such a condition (Tr. p. 64), and Milette, the chute tender, testified that it is very seldom that such a thing occurs. (Tr. p. 84). The shift boss has a number of levels under him and is able to make the rounds only about twice a day. Upon this day he went to the place where the plaintiff was working and to the top of this chute at 8 o'clock that morning (Tr. p. 175), and did not get to the place again until immediately after lunch, that being subsequent to the time the accident occurred (Tr. p. 176). The accident occurred at about eleven thirty, or three hours after the chute had been knocked down by the chute tender (Tr. p. 49). Upon this evidence it is contended by the defendant that, the danger having arisen during the progress of the work and in the doing of a detail thereof and being of unusual occurrence, and no contention being made that the defendant had actual notice of the existence of the danger, sufficient time had not elapsed to charge the defendant as a matter of law with notice.

At the close of all the testimony the defendant requested the court to give two instructions which the Court refused to give. These instructions are found in the transcript at pages 233 and 234. Particularly requested instruction No. 2 was intended to call the attention of the jury to the fact that before they could find for the plaintiff they must first find that the defendant either had actual notice of the danger attendant upon the said chute being hung up on the sixth floor and over the opening in the chute, or that sufficient

time had elapsed from the time that said condition arose until the time of the accident, to warrant the inference that the defendant should, in the exercis of ordinary care, have discovered the condition, that is to say, that the defendant had constructive notice thereof.

There is another feature of the case to be considered, and that is the ruling of the trial court in excluding the evidence of Dr. William F. Rolfs—whose name through error is printed as William F. Ross. It appeared that Dr. Rolfs had attended the plaintiff prior to the time of the accident. Plaintiff claimed that as a result of falling into the said chute he sustained a hernia and Dr. Rolfs was asked whether or not prior to the accident he had provided a truss for Mr. Dalo for said hernia (Tr. p. 145). At the close of all the testimony, the Court being particularly interested in this question, and inasmuch as it was thought by the Court that, in order to properly raise the question of the admissibility of Dr. Rolf's testimony over the objection that the communication was privileged, an offer of proof should be made, the Court requested the defendant to make such offer which will be found at pages 235 and 236 of the transcript.

The assignments of error which the defendant will rely upon in this case are as follows:

I.

The evidence does not disclose that the injuries complained of by the plaintiff were sustained by reason of

any carelessness or negligence on the part of the defendant which was either the proximate cause of said injuries or contributed in any case thereto.

II.

The Court erred in refusing to give the defendant's requested instruction No. 1.

III.

The Court erred in refusing to give defendant's requested instruction No. 2.

IV.

The Court erred in sustaining the plaintiff's objection to the following question propounded Dr. Rolfs:

> "Q. Doctor, prior to that time state to the jury if Mr. Dalo had a hernia and whether or not a truss was provided for him."

And in sustaining the plaintiff's objection to the offer of the defendant to prove by Dr. Rolfs that prior to the time the plaintiff went to work for the Federal Mining & Smelting Company and prior to the accident the plaintiff suffered from a hernia and was supplied by the doctor with a truss to relieve said condition.

ARGUMENT.

I.

The Master Was Not Negligent.

The best reasoned cases draw a clear distinction be-

tween the duty of the master in respect of a structural defect and his duty in respect of defect which arises in the course of the operation or progress of the work. If a defect is found to have been structural the master, owing a continuous duty to maintain a place, machinery or appliances in a reasonably safe condition, is not required to have actual notice of the defect, and it is not necessary that a sufficient length of time should have elapsed so that a jury might say that the master should have ascertained the defect and either warned the servant thereof or remedied the condition. On the other hand, if a place of work, machinery, or appliances are originally reasonably safe, the master has performed his full duty toward the servant in respect of furnishing the same and is not responsible for a defect occurring therein which is due to the progress of the work, unless the master had actual notice that such defect occurred, or that such a length of time had elapsed between the time that the dangerous condition arose and the time of the accident, to warrant the inference that, in the exercise of ordinary care, he should have discovered the same by means of inspection, and have, either removed the danger, or warned the servant of the existence thereof.

At the trial of the case it was the contention of the defendant, and it is now the contention of the defendant, that the defect which arose in the course of the drawing of the chute by reason of the fact that the chute hung up over the opening or top thereof, was a defect and consequent danger arising in the progress

of the work, and was not only unknown to the defendant, but that a sufficient length of time had not elapsed between the time the condition arose and the time of the accident to the plaintiff to charge the defendant with constructive notice thereof. It will be borne in mind that the chute tender Milette knocked down the chute at about eight thirty in the morning and the accident occurred at eleven thirty; in other words but three hours had elapsed. It will further be remembered that the shift boss had made his rounds and visited this place prior to the time the chute was drawn, that is, at a time when the condition was perfectly safe, and did not, in the course of his duties, return to this place until after the accident. The hanging up of the chute over the opening was not such a usual or common occurrence that it can be said as a matter of law that the master was required to keep a lookout continuously for such an occurrence. The plaintiff, who had been a mucker for a long time and had had ample opportunity to observe such conditions if they had theretofore arisen, stated that in his experience he had never known of such a condition, and Milette, the chute tender stated that the hanging up of a chute over the opening was an unusual occurrence, and that ordinarily and usually the method employed by the defendant of knocking down chutes by pounding thereon with a hammer released all material, including such as might be lying over the opening, causing the same to fall to the bottom thereof, and leaving the opening clear so that its condition is readily observable by those who have occasion to pass by the same.

The principle for which we contend is aptly stated in the case of *Hicks v. Hammond Packing Co.,* 171 S. W. 937 (Mo.), which was a case where a step on a stairway became defective. The Court say:

> "Such is the substance of the testimony of defendant's witnesses, and it is contended that plaintiff's own testimony conclusively shows that the defect was not in existence when he went to work that morning. The fact is important in its bearing on the issue as to whether or not defendant, as master, exercised reasonable care to provide its servants a reasonably safe place in which to work, and the Court properly instructed the jury to find for the defendant if 'the defective condition complained of did not exist prior to the day plaintiff was injured.' That was an application of the rule that a master is entitled to a reasonable time and opportunity to discover and repair a defect in the place of work which arises *during the progress of the work* and an expression of the conclusion as one of law that the brief period which elapsed between the ascent and descent of the stairway by plaintiff on that day would not permit constructive notice of a defect created during that period. Consequently in finding for the plaintiff the jury, thus instructed, must have believed from the evidence that the defect had been in existence before that day, and that in the exercise of reasonable care defendant should have discovered and repaired it. A careful examination of all of the evidence has led

> us to the conclusion that this finding has substantial support, and therefore that the Court did not err in refusing to give the jury a preemptory instruction to find for the defendant."

And right here it may be noted that the Court refused to submit the case at bar to the jury upon the theory that the master should have had either actual or constructive notice but submitted it upon the sole theory that the defendant failed to exercise reasonable care if it did not anticipate and prevent such condition and consequent injury (Tr. p. 227).

In the case of *St. Louis I. M. & S. Ry. Co. v. Coke*, 175 S. W. 1177 (Ark.); a conductor on one of defendant's trains was injured by reason of the fall of a bridge through which the caboose on which he was riding was precipitated. The question was as to whether or not the cause of the bridge falling was the result of a rail which had become defective in the course of operation or was the result of a structural defect in the bridge. The Court on page 1182 say:

> "It is the duty of the master to exercise ordinary care to provide the servant with a safe place in which, and safe appliances with which, to do his work, but where the injury to the servant results from a defect that is not structural then, in order to render the master liable, it must first appear that he knew, or by the exercise of ordinary care, should have known, of such defect." (Citing a number of cases.)

In the case of *Nelson v. R. J. Reynolds Tobacco Co.*, 57 S. E. 127, it appeared that a passage was was blocked. The concrete negligence, if any existed, was the failure on the part of the defendant to provide a reasonably safe place for the ingress and egress of its employes. The Court refused to submit to the jury the question of whether or not the defendant was negligent in causing the passageway to be blocked. The Court say:

> "There is no evidence that the passage way was *per se* unsafe, or that it was rendered unsafe by crowding hogshead in it on any other occasion than the afternoon of the day the plaintiff was hurt. The duty to provide a reasonably safe place to work in, as well as of ingress and egress, is like unto the obligation to provide machinery that is not defective. The trouble must be brought to the master's knowledge, or it must be shown that the master by the exercise of reasonable diligence might have acquired such knowledge. (Citing a number of cases.) We find no evidence of habitual or continual crowding, or any other evidence which would charge the defendant's management with the knowledge that the passage way was being rendered unsafe."

In the case of *Klineintie v. Nashua M. F. G. Co.*, 67 Atl. 573 (N. H.), it appeared that oil had been spilt upon the floor of the room in which plaintiff worked and she fell and broke her arm. She had been at the

place of the accident forty-five minutes and again five minutes before the time she fell, at which times she saw no oil on the floor. The Court on this state of facts say:

> "When the cause of the servant's injury is a condition of the master's instrumentalities produced either by ordinary wear or by the negligence of fellow servants he must show either that his master did, and he did not know, or that his master was, and he was not in fault for not knowing, of the defect in time to prevent the accident. St. Pierre v. Foster, 74 N. H. 4; 64 Atl. 723. In this case there is no evidence from which it can be found that the defendants either knew, or ought to have known of the condition of the floor before the accident. Consequently there is no evidence from which it can be found that they failed to perform any duty the relation of master and servant imposed upon them for the plaintiff's benefit."

In the case of *Acme Box Co. v. Gregory*, 105 S. W. 350 (Tenn.), it appeared that there was a hole in the floor back of where the plaintiff worked, and into which he stepped, causing him to throw his arm over a saw. The hole had been in such an open condition for 4 1-2 hours prior to the accident. In passing upon this state of facts the court say at page 351:

> "But we do not think that the facts show any negligence on the part of the master, since the defect was one that suddenly appeared, and it is not shown that the master had any knowledge of it.

> It is, of course, the duty of the master to exercise reasonable care to inspect the premises and the place where his servants are engaged. But we do not think any presumption of negligence could arise from his failure to inspect during 4 1-2 hours covering the period of existence of the hole unprotected by the patch, when no indication of any wrong was communicated to him by those under whose immediate observation the defect was; that is the defendant in error and his fellow servants."

Pockrass v. Kaplan, 139 N. Y. Supp. 398, was a case where a statutory guard had been removed by a servant without the knowledge of the defendant, and it was held that before the defendant could be charged with negligence in maintaining said saw without such guard, it must have had either actual or constructive knowledge of the fact that the same had been removed.

Schlappendorf v. Am. Ry. Traffic Co., 141 N. Y. Supp. 486, was a case where a servant was injured an hour and a half after a fellow servant had discovered the displacement of a clip on a cable and reported it to one whose notice was notice to the company. The Court say at page 487:

> "The plaintiff was injured within so brief a time after Plank discovered the displacement of the clip and had communicated that fact to Burns—estimated from forty minutes to an hour and a half—the jury would not have been justified in finding any fault of diligence in inspection after the accident or in repair."

Tracy v. Hedden Const. Co., 134 N. Y. Supp. 114, was a case where a plank with a nail in it was left on a runway, due to which the plaintiff was injured. The Court say at page 115:

> "One of plaintiff's witnesses testified that he had used the runway in question several times on the afternoon of October 30th, the last time within twenty minutes or half an hour prior to the plaintiff's accident, and that the piece of plank with the nail in it was not then there. I do not see how the defendant could be charged with constructive knowledge of the presence of the plank with the nail in it on the runway."

In the case of *Peet v. H. Remington & Son Pulp & Paper Co.*, 83 N. Y. Supp. 524, it appeared that a hole was left in the floor through which a plank fell, striking the plaintiff, and causing him to come in contact with machinery upon which he was working, causing injuries to him. Upon this state of facts the Court held that the master was not responsible on the ground that he did not know, and in the exercise of reasonable care could not have known of the condition prior to the happening of the accident.

In the case of *Burke v. The National India-Rubber Co.*, 44 Atl. 307 (R. I.), the plaintiff was injured by falling upon a slippery floor rendered so by grease left thereon by other employes who had been directed by the defendant to clean out a pit formerly occupied by the gearing of a machine. The floor had been left in

such condition for a period of from two to three hours The Court say at page 308:

> "The short interval of time between the leaving of the grease on the floor and the accident to the plaintiff was insufficient to charge the defendant with notice of the condition of the floor and thereby render him liable for a breach of duty to the plaintiff to furnish him safe premises on which to work."

And on rehearing, the contention having been made that the case fell within the principle that the master is required to furnish reasonably safe premises for the servant, the Court draws the clear distinction between structural defects and those occurring during the progress of the work, and say:

> "But we do not think that the case fails within this principle. The defect was not a defect in the construction of the floor itself, but that which was complained of as rendering the floor dangerous was the grease adhering to the brick composing the floor, which had been thrown upon it in the cleaning out of the pit by Mahr and Farley and which had been on the floor but two or three hours, an interval as we thought too short, in the absence of actual notice, to charge the defendant with constructive notice of the condition of the floor. The cleaning up of floors of manufacturies is a part of the duty of the employe, rather than of the master; and if such work is not prop-

> erly done and an accident results to an employe in consequence, the negligence in the absence of notice of the conditions to the master, is clearly, as it seems to us, the negligence of fellow servant or servants."

The Federal Courts have often enunciated this principle though Federal cases have not been found which bear as close analogy to the facts of the case at bar as some of the cases found in the state reports.

However, in the case of *Barrett v. Virginia Ry. Co.*, 244 Fed. 397, it appeared that a step on an engine was defective, and in holding that knowledge of the defendant was an essential element in its negligence, if any, the Circuit Court of Appeals of the Fourth Circuit, at page 399, say:

> "While it is well settled that the master must exercise ordinary care in providing for the servants reasonably safe, sound and suitable machinery and appliances, and also to use ordinary care to discover and repair defects, the master does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care could have known, that such machinery and appliances had become defective and were in an unsafe condition. In other words, it must appear, in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged

to have caused the injury, and these facts must be established by legal evidence." (Citing many cases.)

And in the case of *Patton v. Illinois Central Ry. Co.*, 179 Fed. 530, it appeared that in an action by a brakeman for injuries sustained by the breaking of a ladder rung on the side of a car, there was no proof that the defendant knew of the defect in time to have repaired it, or that its condition had lasted so long that it could have been discovered by the use of ordinary care. District Judge Evans in the opinion of the Circuit Court, says at page 535:

"Or probably it might be more accurate to say that an averment of negligence in failing to provide safe appliances made against the master by an employe, is not sustained unless there is substantial evidence that the master had actual knowledge of a defect in time to have repaired it before the injury, or that the defect had existed so long that knowledge of it should be imputed to the master if it were such that reasonably careful investigation would have developed its existence."

And in the case of *Omaha Packing Co. v. Sandusky*, 155 Federal 897, which was a case where drippings from a truck froze upon a platform, the Circuit Court of Appeals of the Eighth Circuit say, at page 900:

"Neither is the rule which makes it the positive duty of the master to provide the servant a reasonably safe place in which to work, even if it

extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. In this case, if the platform became dangerous during the day, it was by reason of this trucking carried on in the progress of the work, either necessarily or from the manner in which the work was done by other employes, and, if the platform became dangerous through their negligence, that was one of the risks which the plaintiff assumed when he entered the defendant's employment."

And in the case of *Bush v. Cincinnati Traction Co.*, 192 Fed. 241, which was a case where a cross-wire broke, pulling a lug out of the wall of the building from the weight of the cross-wire against which the plaintiff was leaning, the Circuit Court of Appeals of the Sixth Circuit state the rule as follows, page 243:

"The rule is well settled that an employer is not the guarantor of the safety of appliances furnished for the use of the employe, or with which the latter will in the course of his employment naturally come in contact; that the employer is bound only to furnish reasonably safe appliances and to protect the employe from such danger in the performance of his work as in the exercise of ordinary care and prudence can be provided against; that the employe is presumed to assume the risks

> of such injury from accident as are incident to the nature and character of the employment, and against which the employer could not, in the exercise of ordinary care, have protected him; and that no recovery can be had against an employer where the defect causing the injury was unknown to the employer and could not have been known in the exercise of ordinary care."

The case of *Norfolk & Western Ry. Co. v. Reed,* 167 Fed. 16, was a case of a defective brake handle on a foreign car which had come into the yard at three a. m. and the accident occurred at eleven a. m. The Circuit Court of Appeals for the Fourth Circuit approved the following statement of the law made by the trial court in his opinion which is quoted on page 5 of the reporter as follows:

> "It is undoubtedly true that the general rule governing the proof requisite in the case of servants injured by defects in machinery or appliances requires that the plaintiff prove, not only the defect, but that the master either knew of it, or that it had existed for a sufficient length of time to warrant the fair presumption that he should have known of it."

And in applying this rule to the evidence in that case the Court held that as a matter of law the master was not negligent in failing to discover the condition of the brake within that time.

II.

The Court erred in not giving defendant's requested instruction No. 1, *as follows: "Gentlemen of the Jury, the plaintiff in this case does not claim that the defendant Mining Company was negligent in not warning the plaintiff of the possibility of the chutes hanging up upon the floor, and you are instructed that failure to warn or instruct is not negligence which caused or contributed to the accident, and therefore the plaintiff can not claim a recovery against the defendant in this case because of such failure."*

As indicated the Court submitted this case to the jury solely upon the theory that the master should have anticipated the condition causing the accident, that is, that the master did not fulfill its full duty and obligation if it did not actually discover the condition and remove the same. There was no complaint made or theory propounded that the plaintiff's want of knowledge that such a condition might arise, caused the injury, and it was intended by this requested instruction to guard the jury against an error in concluding that the master was negligent in failing to warn or instruct the plaintiff that such a condition might arise. We think clearly the instruction should have been given.

This matter should be considered in connection with the refusal of the Court to grant requested instruction No. 2.

III.

The Court erred in refusing to give defendant's re-

quested instruction No. 2, as follows: "You are instructed that before you can find defendant guilty of negligence in failing to discover and remove the danger which resulted in plaintiff's accident and injury, you must first find that, in view of all the circumstances in the case, sufficient time had elapsed before the accident to enable the defendant, in the exercise of ordinary care, to have discovered and removed the danger."

The Court instructed the jury as follows, and as we understand it this is the essence of the instruction covering the duty of the defendant (Tr. pages 26 and 27):

> "But it is the duty, as I have already stated, of the employer, and was the duty of the defendant in this case, by a reasonable system of carrying on this work and by reasonable inspection from time to time, to discover and to eliminate dangers which were unnecessary, and were reasonably avoidable. That is especially true where work is being carried on at different places, by different employes, so that there is no direct connection between the work of one and that of another. Now, in the light of what I have said to you, you will consider all the circumstances in evidence in this case and say whether or not the conduct of the defendant company measures up to the general standard to which I have directed your attention; that is to say, whether in the light of all these circumstances the defendant company exercised the degree of care which an ordinary prudent employer would,

under the circumstances, have exercised, in order to anticipate and prevent such injury."

This instruction so far as it goes, may perhaps not be considered as erroneous inasmuch as the Court advised the jury that the duty of the master to "anticipate and prevent" injury is based upon the duty to make a reasonable inspection from time to time for the purpose of discovering and eliminating such danger, but the instruction does not go far enough in that it fails to advise the jury under what conditions inspection, anticipation and prevention of injury are the measurable duty of the master. Such defect would manifestly have been supplied had the Court given the second request of the defendant whereby the jury would in substance have been advised that under the circumstances of this case the duties of inspection, anticipation and prevention on the part of the master arise only in the event of actual knowledge of the condition which had arisen during the progress of the work, or in the event of a sufficient lapse of time between the occurrence of the danger and the accident to charge the defendant with constructive notice.

If it should be contended in this particular case that, although only a very short time, to-wit: a matter of three hours, had elapsed between the time the danger arose and the time of the accident, the time was long enough so that as a matter of law a court could not say that the defendant could not have had constructive notice of the danger but might have had an opportunity in the exercise of reasonable care to remedy the same:

nevertheless it can not likewise be said that as a matter of law the time was sufficient to charge the master with constructive notice; but the question as to whether or not such a sufficient length of time had elapsed, should at least have been submitted to the jury.

In the case of *Hirsch Bros. v. Ashe,* 80 S. W. 650 (Tex.) it appeared that a defective ladder was furnished to the plaintiff. The plaintiff averred in his petition that the ladder so furnished the plaintiff by the defendant was wholly insufficient and fatally defective; that such insufficiency and defective condition of said ladder was not patent and open to his observation, and the same was unknown to the plaintiff and unsuspected by him; that the insufficiency of said ladder and its defective condition were known to the defendant, or by the exercise of ordinary care might have been known to them. The defendant requested the Court to give the following instruction:

> "The jury are charged that the master is liable for defects in appliances furnished his servant with which to work only when he knew or by the exercise of ordinary care could have known of the existence of the defect. Unless, therefore, you believe from the evidence that the ladder broke as alleged by plaintiff because of some defect therein, and that the defendant knew, or could have known of the existence of such defect, if any, by the exercise of reasonable care, then you will return a verdict for the defendants."

Instead of this the Court charged as follows:

"And if you further believe from the evidence that the defendant negligently failed to furnish plaintiff with a proper and sufficient ladder—that is, one which was reasonably safe, with which to do his work as directed—and negligently furnished him with a defective and insufficient ladder which was not reasonably safe for the purposes for which it was used, etc., you will find for the plaintiff. If you do not believe from the evidence that plaintiff's injuries were, and are the proximate result of negligence upon the part of defendants, then you will find your verdict for the defendants."

And further instructed the jury:

"You are charged that negligence is the failure to exercise ordinary care; that is to say, it is a failure to exercise that degree of care which a reasonably prudent man would have exercised under the same, or similar, circumstances."

In commenting upon the giving of this instruction and the failure to give the instruction requested by the defendant, the Court say:

"While this would not be positive error requiring a reversal of the case when considered in connection with the pleading, it was error to refuse the defendants' requested instruction defining the circumstances under which they should be held negligent. They had the right to have the attention of the jury directed specifically to the

> defense that they did not know of the defect in the ladder, if it was defective, and could not, by the exercise of ordinary care, have discovered the same."

And in the case of *Winslow v. Missouri K. & T. R. Co.*, 192 S. W. 121 (Mo.), it appeared that a hole was left along a side track of the defendant railway company. The Court, on page 125, say:

> "Conceding that the hole made the place not reasonably safe, plaintiff can recover only in case the defendant knew, or in the exercise of ordinary care, might have known of the presence of the hole in time to have removed it before the accident."

And upon the failure of the court to advise the jury that the defendant could only be held liable in case it knew, or in case it could have, in the exercise of ordinary care, ascertained the presence of the hole, the Court say at page 125:

> "Furthermore, plaintiff's instructions do not submit the question of whether defendant had actual notice. They nowhere ask the jury to say whether the defendant knew of the hole, nor, if so, whether defendant had such knowledge sufficiently long before the action to have enabled it to have repaired the same in the exercise of ordinary care. An instruction must be explicit and submit to the lay minds of the jury the concrete facts which determine whether the defendant 'carelessly and negligently permitted' the hole to exist in its rail-

way yard. To ask the jury whether the defendant carelessly and negligently permitted the hole to exist in its yard, without telling them what will constitute a negligent permission, is to submit a question of law to the jury.

"Again upon closer examination, it will be found that it does not even submit this question of law to the jury. It says that, if the jury find from the evidence certain facts as to plaintiff's employment, his duty to inspect cars and closed doors, etc., and that in the performance of his duty he got into the car, and while alighting from said car door he stepped or jumped into a washout hole, or depression, which the defendant carelessly and negligently permitted to exist in its railway yard at the station, and which it carelessly and negligently permitted to be covered with weeds or brush, and was injured, then the verdict should be for the plaintiff. This is a description of the hole or an assertion that it was carelessly or negligently permitted to exist, and not a submission of that question to the jury."

In the case of *Howard v. Bedenville Lumber Co.*, 108 N. W. 48, which was a case of a hole in the floor through which a piece of wood fell and injured the plaintiff, the Court gave the following instruction to the jury:

"You are instructed that it was the duty of the defendant to provide a place that was reasonably

safe for the plaintiff to do his work in while in the exercise of reasonable care."

And, in the language of the Appellate Court, gave further instructions in connection therewith, well calculated to impress upon the minds of the jury the idea that such rule applies, not only to the time the working place is originally furnished to the servant, but to every instant of time thereafter during the period of his employment. Such instructions the Court held to be very misleading and in commenting thereon say:

"True, it is the duty of the master to furnish the servant with a reasonably safe place in which to work. True, that duty is absolute. It cannot be delegated by the master. It cannot be performed by him merely exercising ordinary care to furnish such place. It is satisfied only by the actual furnishing thereof. But that refers to the time the servant is put to work, not to every time when, thereafter, in the course of continuous employment at the customary intervals he re-occupies his place, not to every instant of time during the period of his employment. A reasonably safe working place having been furnished the plaintiff, the absolute duty in that regard is satisfied. Then becomes active the secondary duty to exercise ordinary care to preserve for the servant the reasonably safe condition of his working place. In case of its becoming unsafe during the course of his employment, and the servant receiving an injury thereby before the master has knowledge of the

existence of the danger, or has reasonable opportunity to obtain such knowledge, and reasonable opportunity to remedy the danger, he is not liable." (Citing a great number of cases.)

And quoting from the case of *Olson v. Maple Grove C. & M. Co.*, 115 Ia. 74; 87 N. W. 736, the Court say:

"The doctrine that the master must provide a safe place has no application to the case where the place becomes unsafe during the progress of the work."

And in the case of *American Sheet & Tin Plate Co. v. Bucy*, 87 N. E. 1051, the trial court gave the following instruction to the jury:

"No. 2. If you find, by a fair preponderance of the evidence in this case, that the plaintiff was in the employ of the defendant on the 6th day of January, 1906, engaged with two other men employed by the defendant company, in moving by means of trucks, as described in the complaint, tin plate from one portion of the building to another, and that there was provided by the defendant company a track-way composed of wooden planks nailed and attached to sleepers imbedded in the ground, and that from said runway there led off running in a lateral direction, other certain iron cross-runways constructed of steel or iron, and that the approaches to said runways where the same were constructed of steel and iron, were made of wood, but being attached to joists or

sleepers, imbedded in the ground; and you find by a fair preponderance of the evidence that the cross-runway adjacent to sorting table No. 2 was so negligently constructed that the wooden end of the cross-runway extending along sorting table No. 2 was weak and springy and gave down when the loaded truck was drawn thereon by the plaintiff and his employes, so that when being drawn in a careful and prudent manner it struck against the iron runway by reason of the wooden approach, giving down and lowering by reason of the weight of the load upon the track, and you further find that plaintiff was using due care and proceeding in a proper manner in conveying said loaded truck, and you further find that, by reason of the depression of the wooden approach to the iron runway, the wheels struck against the iron runway and caused the load of tin upon the same to topple over and fall upon the plaintiff and injure him as complained of in the complaint—then the defendant company would be guilty of negligence in the manner of constructing the runway as it approached the iron portion thereof, and if it was properly constructed, but became out of repair so that it gave down when the load passed over it like plaintiff and co-employes were drawing, the company would be negligent in so maintaining the same; and if the plaintiff without fault on his part, contributed to his injury at the time, then your finding should be for the plaintiff."

In commenting upon this instruction the Court say at page 1052:

> "It is urged that this instruction is defective in two respects. First, that it instructs the jury that if said runway became out of repair the company would be negligent in so maintaining the same without informing the jury that before said company could be held negligent, either it should have knowledge of such defective condition or that the same had existed for a sufficient length of time to imply knowledge; second, that the instruction wholly fails to instruct the jury as to the element of assumed risk. It will be observed that the instruction directs the jury to find for the plaintiff if they find a certain state of facts to be true. This is a positive direction and warranted the jury in finding for plaintiff notwithstanding it should be convinced from the evidence that the defective condition was unknown to appellant, and had only existed a very short time, or that it should find for the plaintiff notwithstanding he was wholly familiar with such defective condition, either of which findings would be unwarranted under the law."

In the case of *Mallott v. Sample*, 74 N. E. 245 (Ind.) a complaint which failed to state the length of time that a defect had existed and to show facts from which it could be determined either that the defendant knew, or in the exercise of reasonable care, could have known of

the defects, was insufficient. The case is a brief upon the question under consideration.

There being no contention on the part of the plaintiff in this case that the defendant had actual knowledge of the existence of the danger, the Court should have submitted to the jury the question of whether or not in the exercise of ordinary care under the existing condition, the master ought to have known of the danger prior to the accident and have remedied the same.

IV.

The Court erred in refusing to permit Dr. Rolfs to testify that long prior to the accident to the plaintiff alleged in his complaint the plaintiff suffered from a hernia and that the doctor prescribed and procured a truss for the plaintiff.

Section 5958 of the Revised Codes of Idaho provides as follows:

> "Section 5958. There are particular actions in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases:
>
> 4. A physician or surgeon cannot, without the consent of his patient, be examined in civil actions as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

It is well settled that the privilege may be waived and

it is the contention of the defendant that, when a plaintiff in a personal injury suit gets upon the stand and testifies to the nature and character of his injuries, he waives his privilege and can not thereafter claim it, especially in a case where, by the claiming of the privilege, he would be committing a manifest fraud upon the court and the defendant.

Plaintiff and his physicians testified that one of the severest injuries suffered by him as the result of the accident was a hernia. The defendant was in a position to prove by Dr. Rolfs that the plaintiff had this hernia prior to the accident and that the doctor had prescribed and procured a truss for him. The theory upon which the privilege is allowed is that the law will not permit the public disclosure of ailments of a patient by a physician to whom the patient has disclosed such ailments, but the logic of the principle is entirely lost when a patient himself gets upon the stand and publishes to the world the nature and character of an injury to the full extent to which he has disclosed the same in confidence to his physician; and to say that such disclosures to the physician must thereafter be treated in confidence by the physician is to entirely destroy the reason for the rule, especially when the plaintiff is thereby permitted to suppress the evidence of his own fraud and perjury.

There is perhaps no writer who speaks with greater authority upon the subject of evidence than is Mr. Wigmore, who discusses this subject under the head of privileged communication between physician and pa-

tient in Vol. 4 of his work on Evidence, and we particularly call the Court's attention to paragraph 2389 thereof where Mr. Wigmore uses the following language:

> "Same; Waiver by Bringing Suit; by Testifying; by Former Waiver. (1) In the first place, the bringing of an action in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: 'One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But, stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim; I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the Court will forbid his testimony.' If the utter absurdity of this statement (which is

virtually that of every such claimant) could be heightened by anything, it would be by the circumstances (frequently observable) that the dreaded disclosure, which the privilege prevents, is the fact that the plaintiff has suffered no injury at all. In actions for personal injury, the permission to claim the privilege is a burlesque upon logic and justice. In actions upon insurance policies, where fraudulent misrepresentations as to health are in issue, the insured's initial conduct in volunteering a supposedly full avowal of his state of health has put him in the position of abandoning any desire to be secretive towards the insurer on that subject, and of giving the insurer in fairness the right to ascertain the truth; and a waiver should be predicated by the nature of the action. Yet here the injury to justice by denying a waiver is not so considerable; for in fairness (that is, to honest applicants, who have nothing to fear) the insurer ought immediately to make his extrinsic investigations among prior attendant physicians (which commonly he does not do), instead of waiting till more premiums have been paid and the insured has left the world; so that here the moral inequities are more nearly balanced, and no particular harm is done by the privilege—except to the logic of the law. In testamentary causes, there is ordinarily no conduct amounting to waiver—although it is otherwise unsoud (ante, 2381, 2384) to treat the data of sanity and insanity as having been consciously confided, in any sense of the word, to

the physician. So far as judicial rulings go, only actions against a physician for malpractice have been deemed to involve a waiver.

"(2) The party's own voluntary testimony, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue; the reasons here being merely somewhat stronger than those above noted. Courts have rarely conceded this; though statutes have often enacted it. Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege."

In the case of *Lane v. Boycourt,* 27 N. E. 1111, the Supreme Court of Indiana use the following language:

"We come now to a question presented by the ruling denying a new trial. The appellee, his wife, and his wife's mother testified as to all that was done by the appellant at the time the surgical operation which caused the injury to the appellee's wife was performed. The appellant also testified, without objection, to what occurred at that time. He then called Dr. Williamson, who was in attendance as a consulting surgeon, but the trial court refused to permit him to testify to any matter that occurred at the time the operation was per-

formed by the appellant. In our judgment this was error. The testimony given by the witnesses of the appellee broke the seal of privacy, and gave publicity to the whole matter. The patient waved the statutory rule. The course pursued laid the occurrence open to investigation. Nothing was privileged, since all was published. The statute was not meant to apply to such a case as this, nor is it within the letter or the spirit of the law. If a patient makes public, in a court of justice, the occurrences of the sick-room for the purposes of obtaining a judgment for damages against his physician, he cannot shut out the physician himself, nor any other who was present at the time covered by the testimony. When the patient voluntarily publishes the occurrence, he cannot be heard to assert that the confidence which the statute was intended to maintain inviolate continues to exist. By his voluntary act he breaks down the barriers, and the professional duty of secrecy ceases. It would be monstrous if the patient himself might detail all that occurred, and yet compel the physician to remain silent. The principle is the same whether the physician called is a consulting physician or the defendant. The opening of the matter to investigation removed the obligation of secrecy as to all, not merely as to one. When the obligation to silence is broken, it is broken for the defendant as well as for the plaintiff. As to all witnesses of the transaction, it is fully opened to investigation, if opened at all by the party having a right to keep

it closed. A patient cannot elect what witnesses shall be heard and what shall not; for if once investigation legitimately begins, it continues to the end. A patient may enforce secrecy if he chooses; but, where he himself removes the obligation, he cannot avail himself of the statute to exclude witnesses to the occurrence."

Also see *Reinhan v. Dennin,* 9 N. E. 3204 (N. Y.).

Morris v. N. Y. O. & W. Ry. Co., 42 N. W. 410 (N. Y.).

Lawson v. Morning Journal Ass'n, 52 N. Y. Supp. 484.

In re *Burnett,* 55 Pac. 575, wherein it was held that where a party to a cause publishes confidential communications in newspapers he waives the privilege. This was a case of attorney and client.

The case of *State v. Long,* 165 S. W. 749 (Mo.), is a brief on the subject of waiver of privilege by testifying and calling one physician, and a quotation therefrom would be too long.

Deadly parallel is the case at bar with *McPherson v. Harvey,* 183 S. W. 653 (Mo.). This was a personal injury action in which the plaintiff recovered substantial damages. She testified that owing to the accident she sustained severe abdominal injuries and was substantiated in this testimony by a physician who attended her. Subsequent to the trial the attorneys for the defendant discovered that instead of her condition be-

ing the result of the accident, it had existed for a long time prior thereto, and that she had been attended by another physician who endeavored, however unsuccessfully, to alleviate the condition. A motion for a new trial was made upon the ground of newly discovered evidence which was granted by the trial court. The question squarely presented was whether or not the testimony of the attending physician was privileged, and in holding that the lower court did not err in granting a new trial because of the fact that the said newly discovered evidence was not privileged, the Court say:

> "The most important question for solution in the consideration of the ruling of the court is whether or not the newly discovered evidence, which consists of the knowledge a physician of plaintiff acquired of her state of health during the existence of the confidential relationship between them of physician and patient, is privileged and may not be used against plaintiff without her consent. There can be no doubt that it was privileged at the beginning of the trial, and, if plaintiff had done nothing to waive such privilege, defendants would not have had the right to offer the witness at the trial, and therefore could not avail themselves of his testimony as newly discovered evidence. In her own testimony, as well as in that of her physician and surgeon, plaintiff went into the subject of her malady, exposing everything and concealing nothing, except the highly important fact, if it be a fact, that the malady was not caused by the injury, but was of long standing and had been accurately

diagnosed, but unsuccessfully treated, by a physician for almost two years. In the recent case of Michaels v. Harvey et al., 179 S. W. 735, after a careful review of the decisions of the Supreme Court bearing on the subject, we applied the just and sensible rule announced in State v. Long, 257 Mo. (Loc. Cit.) 221, 165 S. W. 748, that where the patient for purposes of gain or advantage discloses the nature and secrets of his malady he renounces his statutory privilege, and opens the door to a full judicial injuiry into the subject-matter of his own importation into the case, and that where several physicians have treated the patient for the same trouble it can make no difference that their treatment was at different dates. Under this doctrine, the physician would have been a competent witness at the trial, and we pass to the question of the propriety of the ruling in granting a new trial on the ground that his testimony should be treated as newly discovered evidence within the technical meaning of that term."

The case of *Roeser v. Pease,* 131 Pac. 534, is likewise on all fours with the case at bar. In this case it appeared that the plaintiff's testimony was to the effect that prior to the accident she was in good health but that since the accident she had poor health and had suffered a great deal with her back and had headaches and was unable to work without the occurrence of these pains; that prior to the accident she had not had these backaches and headaches to amount to anything. In holding that the testimony of a physician who had

treated the plaintiff for headaches prior to the injury, was not privileged, and that by herself testifying and calling another physician she had waived any privilege which she might otherwise have claimed, the Supreme Court of Oklahoma say, page 536:

> "Counsel for the plaintiff and defendant do not disagree as to the law. Both sides concede that the doctor's testimony is protected by the plaintiff's privilege, unless she has waived it by offering herself as a witness on the same subject; and whether or not she had testified on the same subject is the point of issue between counsel. The subject, of course, is the condition of her health some six or seven or eight months prior to the accident, at which time Dr. Grosshart testifies as to her condition. Did she testify on this subject at the trial? The substance of her testimony is to the effect that she was in good health just before the accident; that for a year previous to that time she, as a rule, was a healthy woman; that she never had a headache to amount to anything at all. From this testimony it appears that she did testify generally as to the condition of her health prior to the accident, and specifically that she was not accustomed to having headaches before that time . Some authorities are cited by the plaintiff tending to show that one does not waive the privilege by giving testimony as to his general health or physical condition. But in the case at bar the plaintiff not only testified as to her general health, but she testified specifically with reference to headaches. Here the exact

point at issue was whether or not these headaches and backaches, from which she testified that she was suffering at the time of the trial, were permanent injuries caused by the accident. The effect of her testimony was to lead the jury to believe that she had not suffered from these same afflictions prior to the accident. If she can go upon the witness stand and testify that she had not suffered from these afflictions prior to the accident, and then prevent the only available impeaching testimony from being disclosed, by a claim of privilege, it would seem that a mockery is being made of justice, and we do not think our statute contemplates such a condition. The theory upon which the privilege is based is that a person is entitled to have his physical disabilities protected from public curiosity. If, however, he goes into a court of justice and bases an action upon the existence of a physical disability, and testifies himself as to its existence or nonexistence, he, of course, is not entitled longer to claim a privilege for his condition, and the statute does not contemplate protecting him in such case. An interesting discussion of the subject is contained in the fourth volume of Wigmore on Evidence, paragraph 2380 et seq."

The case of *Epstein v. Pennsylvania Ry. Co.*, 250 Mo. 1; 156 S. W. 699, Ann. Cas. 1915, A. 423, likewise is a brief and we shall content ourselves by citing the same and calling the Court's attention to the note appended thereto, which, however, is not exhaustive.

A further full discussion of this subject is found in *Oliver v. Ayler,* 158 S. W. 733 (Mo.); *Michaels v. Harvey,* 179 S. W. 735. See also *Priebe v. Crandall,* 187 S. W. 905 (Mo.); *O'Brien v. Western Implement Mfg. Co.,* 125 S. W. 804 (Mo.).

In the case of *Fulsom-Morris Coal & Mining Co. v. Mitchell,* 132 Pac. 1103, the Supreme Court of Oklahoma, approving its ruling in *Roeser v. Pease* (*supra*), say:

> "Defendant was informed on the first day of trial that Dr. Logan had been called in attendance upon the plaintiff. Presumably his attendance if procurable by the plaintiff, could likewise have been obtained by defendant, if desired. The doctor's testimony was no longer privileged under section 842 Comp. Laws 1909. The plaintiff having proffered himself as a witness and testified specifically in regard to his injuries, the doctor's testimony would have been competent either for or against him."

And again, in *City of Tulsa v. Wicker,* 141 Pac. 963, (Okla.), it appeared that during the course of the trial plaintiff offered himself as a witness in her own behalf and testified as to the nature and extent of her injuries, and the time and place of treatment of the same. Her testimony as to the nature and extent of her injuries was that she was badly bruised across the left hip and that said bruise was six inches long and as wide as her two fingers; and as a result of such injuries she suffered great pain and was unable to sleep for fourteen

months, and as a result became very nervous. Her testimony touching the time and place of treatment was that in January, 1910, she consulted Dr. J. E. Webb, who prescribed for her and she remained under his care until August of the same year, after which time she called at his office for treatment on various occasions. In holding that the exclusion of Dr. Webb's testimony was error the Supreme Court of Oklahoma say:

> "This court held in Roeser v. Pease, 37 Okl. 222, 132 Pac. 534, St. L. & St. R. Co. v. Hurley, 30 Okl. 333, 120 Pac. 568, and Fulsom-Morris C. & M. Co. v. Mitchell, 37 Okl. 575, 132 Pac. 1103, that the testimony of the physician or surgeon concerning any knowledge obtained by him from a physical examination of the patient may be required by the opposite party, if the patient offer himself as a witness and testify upon the same subject. See also Wigmore on Evidence, paragraph 2380 et seq.; 10 Enc. of Evi. p. 147; Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb. 39, 89 N. W. 448; Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488; Rauh v. Deutscher Verein, 29 App. Div. 483, 51 N. Y. Supp. 985; Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442; People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Treanor v. Manhattan Ry Co. (Com. Pl.) 16 N. Y. Supp. 536; Marx v. Railway Co., 56 Hun. 575, 10 N. Y. Supp. 159; Morris v. N. Y. & W. Ry. Co., 148 N. Y. 88, 42 N. E. 410, 51 Am. St. Rep. 675; In re Burnette, 73 Kan. 609, 85 Pac. 575."

In the case of *Capron v. Douglas,* 85 N. E. 827 (N. Y.), it was held that where plaintiff testifies as to injuries or permits others to do so it is a waiver of her privilege against the testimony of still other physicians.

See likewise *Speck v. International Ry. Co.,* 118 N. Y. Supp. 71.

As indicating this view of the law see *Hunt v. Blackburn,* 128 U. S. 464, 32 Law Ed. 488; *U. P. Ry. Co. v. Thomas,* 152 Fed. 365 (8 C. C. A.).

As likewise bearing upon the subject see *Farnley v. Farnley,* 98 Pac. 819 (Colo.); *State v. Bennett,* 110 N. W. 150 (Ia.); *Woods v. Incorporated Town of Lisbon,* 130 N. W. 372 (Ia.); *Kelley v. Cummons,* 121 N. W. 540 (Ia.); *State v. Hoben,* 102 Pac. 1000 (Utah).

It is only fair to the Court to call the Court's attention to *Jones v. the City of Caldwell,* 20 Ida. 5; 116 Pac. 110, in which apparently the contrary rule is announced, and further to state that much authority can be found in the adjudicated cases to sustain the proposition that calling one physician does not waive the privilege as to another physician who had been called in attendance. However, the Idaho case cited, and none of the others which have been found, go to the extent of saying that where a fraud is attempted to be perpetrated upon the defendant and the court, such testimony will be excluded on the ground of privilege. We therefore say that the Idaho case and others which might be found to the same effect, are not conclusive upon the proposition for which we are contending, namely, that reason and justice demand that a plaintiff

in a personal injury suit should not be permtited, when he has disclosed to all the world the manner and character of his illness, to withhold from the Court and the jury the truth and deny the defendant, from whom he seeks damages, the opportunity to prove that the injuries of which he complains, and which he charges the defendant with negligently inflicting upon him, were not as a matter of fact caused by the defendant but existed long prior to the time that the plaintiff was injured. The contrary rule is not based upon reason and justice and should be discredited.

Respectfully submitted,

FEATHERSTONE & FOX,
Attorneys for Defendant,
Wallace, Idaho.

No. 3127 17

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FEDERAL MINING & SMELTING COMPANY, a Corporation,
Plaintiff in Error,

vs.

ANGELO DALO,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court for the District of Idaho, Northern Division.

THERRETT TOWLES,
Wallace, Idaho;
PLUMMER & LAVIN,
Spokane, Washington,
Attorneys for Defendant in Error.
FEATHERSTONE & FOX,
Attorneys for Plaintiff in Error.

THE FRANKLIN PRESS, SPOKANE

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THE FRANKLIN PRESS, SPOKANE

THE ISSUES.

On January 13, 1917, defendant in error, employed by plaintiff in error as a mucker in its mine, walking along one of the floors in the underground workings, suddenly fell into and through an ore chute, and was precipitated downward through the same a distance of 30 feet, was buried with ore which fell upon him, was rendered unconscious and sustained severe and permanent injuries. The case came on regularly for trial before the Court and a jury, and verdict in the sum of $5000 was returned, upon which judgment was entered. No motion for New Trial was made or presented, and from such judgment this appeal is prosecuted upon four assignments of error: 1, that no negligence upon the part of the master is shown; 2 and 3, upon claimed error in the refusal to give two requested instructions, and 4, the rejection of the proffered evidence of a physician called by defendant which was rejected upon the plaintiff's claim of privilege.

The case will be discussed regularly as presented under the respective assignments.

THE FACTS.

Defendant in error, while walking along one of the floors in an underground tunnel of the under-

ground workings of the mine of plaintiff in error, which was unlighted save by the miner's lamp carried by defendant in error, suddenly fell into a chute which extended downward from the 6th floor, a distance of 30 feet. The floor of the tunnel where the chute existed was filled from wall to wall with a large pile of ore (Tr. 51) completely covering the chute opening so that it was impossible to tell under what part of the pile of ore the chute existed (Tr. 49-52). Numerous men working in the mine, including defendant in error, had for twelve days prior to the accident passed over the ore which completely covered the floor and the opening of the chute, forming a beaten pathway (Tr. 50); the ore had been mucked into the chute and upon the floor around and above the chute by other employees (Tr. 63); defendant in error had not mucked or placed the ore there and had nothing to do with it (Tr. 63); the chutes were drawn from below by other employees and the ore transported from the mine and he had nothing to do with drawing the chutes, nor removing the ore from them. Frequently when the chutes were drawn, the top portion of the ore would not fall, and for the purpose of loosening the ore which did not fall plaintiff in error employed a chute tender (Tr. 76-77). The chute was

drawn at 8:30 A. M. on the morning of the accident (Tr. 79) from a point two floors below the 6th floor (Tr. 79) but only part of the ore fell and the ore upon the floor and over the top of the chute on the 6th floor was not moved and did not fall (Tr. 79). Defendant in error knew nothing of the fact that the chute had been drawn. As defendant in error passed along the 6th floor he walked upon the ore at the only place where under the circumstances he could walk (Tr. 71) and upon the same place where he and other employees, including the foreman of the plaintiff in error, had walked for a period of twelve or fourteen days before the accident. Defendant in error was not warned of the dangerous condition of the floor at the place where he was required to walk. The chute tender, whose duty it was to keep the chutes free from more and to prevent their hanging up, failed to clear the floor and the chute in question.

ARGUMENT.

The whole theory of the argument of plaintiff in error upon the first assignment, headed, "The master was not negligent" (Brief p. 5) is based upon the proposition that the matter of chutes hanging up was such an "unusual occurrence" that

the master was not bound to take any precautions to protect its employees against a danger which was not and could not be anticipated. They concede, however, the rule to be, that if the master knew, or by the exercise of ordinary care should have known of the danger, or that such a length of time elapsed between the time that the dangerous condition arose and the time of the accident, in which the master exercising ordinary care should have discovered, and have either removed or warned the employee of the danger, then a liability would exist (Brief p. 6). All of the cases cited by counsel deal with dangerous situations arising during the progress of work, which on account of their infrequency the master could not anticipate, and which conditions unknown to the master existed for but a short period before the accidents complained of. The cases cited enunciate elementary principles of law, based upon specific facts in each case, which can have no force or effect in the case at bar, and counsel's entire argument being based upon the lack of knowledge on the part of plaintiff in error that chutes hung up after the bottom parts had been drawn, and that it was not obliged to anticipate and provide against a danger of which it had no knowledge, we are compelled to quote from the

record some features of this case which will immediately demonstrate that this case is argued upon a state of facts entirely opposed to the facts involved, and that the true state of facts renders inapplicable every case cited by plaintiff in error.

At Transcript 64 it is sought to be shown that defendant in error knew that it was customary for ore chutes to hang up. At Transcript 66 an effort is made to show that defendant in error knew that a man was employed as a chute tender, whose sole duty was to loosen the chutes which hung up; at Transcript 64 plaintiff in error sought to show that defendant in error himself had drawn chutes that had hung up; Transcript 77-78 show that the plaintiff in error employed a man whose sole and exclusive duty was to draw and loosen chutes which became clogged and hung up. The chute tender was under and subject to the orders of one Brown, the foreman (Tr. 80).

But counsel have evidently overlooked the admitted facts in this case—paragraphs 11 and 12 of the complaint (Tr. 11-12) allege the knowledge upon the part of plaintiff in error of the dangerous conditions existing by reason of ore chutes being filled and hanging, and paragraph 9 of the answer (Tr.

19-20) admits such knowledge upon the part of plaintiff in error, and from page 20 of the printed transcript we quote as follows:

> *"And the said plaintiff well knew that ore chutes frequently hung up and had to be loosened,* and that by reason of the ore hanging up in said chutes that *the defendant employed a man on the said level whose duty it was to loosen the ore in the chutes so that it would drop down,* and the defendant further alleges that plaintiff was familiar with the drawing of ore chutes and had been employed by the defend *to loosen chutes that were hung up,* and that the plaintiff well knew, or ought to have known, that the top of the said number 7 chute was liable to be hung up and the ore drawn from below and that it was dangerous for the plaintiff to step upon the top of the said number 7 chute or *upon the top of any ore chute containing ore and waste."*

And on page 26, paragraph 2 of the affirmative defense pleaded in the answer, we find the following allegations:

> "And knowing that chutes of this kind frequently became hung up so that the upper portion of the chute would not drop down and if loosened by pressure or otherwise, might suddenly drop, and might carry any person who might be standing thereon."

The language of the Court in passing upon a question of law occurring during the trial at Transcript 184 is quite pertinent:

> "But here is a case where the danger is an obvious one, that if the ore did hang up there the condition was such as to be perilous. *It is a condition that ought to have been provided against.* The precautions ought to have been reasonably adequate to prevent the occurrence of such a peril."

The Court must bear in mind that no claim is made that the chute tender, whose duty it was to keep the chutes free from ore, was a fellow servant of defendant in error. No such claim was pleaded, no such contention was made during the trial, nor is such a question raised upon this appeal.

Under the state of the record. and in view of the fact that upon this phase of the case the jury was instructed fairly and fully as to the law applicable, and no exception was taken or preserved to the instructions given, this Court must hold that no error was committed. The record evidences the existence of a dangerous and perilous passageway over which defendant in error was required to walk, a knowledge of such danger upon the part of the plaintiff in error, no knowledge on the part of defendant in error, and an absolute lack of any precaution of any kind being taken by plaintiff in error for his safety.

II.

DEFENDANT'S REQUESTED INSTRUCTION NO. 1.

The assignment of error is not discussed seriously, and plaintiff in error in the brief asks that the matter be considered in connection with its third assignment, and our discussion of that assignment will cover the two questions. However, in passing, we might suggest the Court in passing upon its refusal to give this requested instruction, gave his reason for such refusal in the following language:

The Court: "I think the general instruction I have given is as far as I should go on that particular point" (Tr. 233). "I think in the main they are covered in the general instruction" (Tr. 233).

The general instructions covered every phase of the case and no exception was taken or preserved (Tr. 233).

The instruction requested, quoted at p. 19 of the brief, would have the Court charge the jury that the "plaintiff in this case does not claim that the defendant mining company was negligent in not warning the plaintiff of the possibility of the chutes hanging up on the floor, etc."

This instruction containing as it does an incorrect

and untrue statement of the facts, it was not error to refuse it. That it does not embrace the facts we call your Honors' attention to paragraph eleven of the complaint (Tr. 11 and 12) in which it is specifically alleged that the defendant

> "negligently and carelessly failed to take any precautions, give any warning or notice, etc."

and to paragraph 12 of the complaint (Tr. 12) alleging the defendant's knowledge of the dangerous conditions existing and its failure to warn the plaintiff of the same.

The whole situation was fairly presented to the jury by instructions so complete and fair that not a single objection or exception was taken or preserved.

III.

Plaintiff in error complains of the refusal of the Court to give its instruction No. 2, which reads as follows:

> "You are instructed that before you can find defendant guilty of negligence in failing to discover and remove the danger which resulted in plaintiff's accident and injuries, you must first find that, in view of all the circumstances in the case, sufficient time had elapsed before the accident to enable the defendant in the

exercise of ordinary care to have discovered and removed the danger."

And counsel for plaintiff in error argue in their brief that before the jury could have found the defendant guilty of negligence, it ought to have determined as to whether or not it had sufficient time to enable it to discover the danger of the place where plaintiff was injured in time to have removed the danger. We insist that the Court fully covered this question in its general instructions. It is not error for the Court to refuse to give instructions to the jury in the express language of requested instructions. So long as the subject is covered so that the jury can apply the law as given it by the Court to the facts of the case, this is sufficient.

As to whether or not the defendant had a reasonable time in which to discover and remedy the defect, this is a question of fact for the jury to be determined by it like every other fact. It all goes to the question of the exercise by the defendant of reasonable care to keep and maintain a place in a reasonably safe condition for the use of its servants. Even if sufficient time had elapsed for the defendant to discover and remedy the dangerous situation, this would not be conclusive on the jury as establishing negligence. A great many other things must be

taken into account and into consideration by the jury, and we insist that the Court's general instructions cover not only this question, but all other questions affecting reasonable human conduct. The instructions given by the Court on this question are as follows:

> Pages 224 and 225 Tr.:
> "Generally the first inquiry, and here the first inquiry, touches the question of whether or not the defendant company was negligent substantially in the manner and form alleged in the complaint. Generally speaking, one is negligent who does not, under the circumstances, use the care which an ordinarily prudent person, with due regard for the safety of another, would have used under those circumstances, or who has done something which, under like circumstances, an ordinarily prudent person, with due regard for the safety of another, would not have done. * * * Upon the other hand, if the defendant company failed to exercise that degree of care, then it would be chargeable with negligence. * * * * * * More specifically in this case it is charged that the defendant was negligent in that it failed to perform the obligations which every employer owes to its employee, and that is, to use reasonable care to see that the place where the workman is called upon to perform his duties *is in a reasonably safe condition.* * * * * That obligation implies the duty to see that the place is reasonably safe in the first place, and then, *by the exercise of reasonable care, in the way of inspection and repair, to see that the place is kept or maintained in a reasonably*

*safe condition. * * * * Such dangers as arise, or such dangerous conditions as occur in the course of the work, as a result of the work itself cannot always be provided against or at once corrected."* Ours.

The Court will see that this instruction clearly charges the jury that the defendant is not charged as an insurer, neither is it charged with doing anything but the exercise of reasonable care to discover and remedy dangerous situations and conditions. Now, under the instructions, the jury could have found, if it saw fit to do so, that, under all of the circumstances in the case, three hours' time intervening between the time the ore chute was drawn and the time of this accident was not a reasonable time under all the circumstances and conditions, and the jury could take into consideration the general manner and method of mining operations and the inability of the company to always have a man watching out for dangerous conditions developing during the progress of the mining operations. On the other hand, the jury could find that on account of the peculiar knowledge which the mining company must have had of the danger of ore being hung up in the chutes, it ought to have anticipated that this might happen to this particular chute, and that three hours' time was sufficient,

in the exercise of reasonable care by defendant, to have inspected and discovered the fact that the ore chute was hung up. Again we contend, that the specific instruction requested could have been very misleading to the jury, in that they might have understood that the only thing they could decide, in determining whether or not the defendant had used reasonable care was as to whether or not sufficient time had elapsed between the chute being drawn and this accident to enable it to discover the dangerous conditions, and upon the familiar rule that "the mentioning of one thing impliedly excludes all other things," the jury might have eliminated every other fact and circumstance which intended to show either want of ordinary care, or the exercise of it.

We insist that the jury could not have been mislead by the failure of the Court to give the specifically worded instruction requested; that the instruction given was much more favorable to defendant, although couched in broader terms than was embraced in the requested instruction.

IV.

Under this subdivision (brief 30) plaintiff in error discusses the alleged error of the Court in sus-

taining the objection made to the introduction of the testimony of Dr. Rolfs. That the precise point may be properly presented, we refer to the record briefly as follows:

Dr. Rolfs was called by plaintiff in error for the purpose of testifying with reference to information gained by him while attending defendant in error professionally at a time prior to the infliction of injuries which formed the subject matter of this action. He testified upon voir dire (Tr. 145) that he was, at the time inquired about, attending and treating the defendant in error professionally, and that the information sought to be elicited was based upon information gained by him while conducting an examination of defendant in error for the purpose of enabling him to treat him. This relation was conceded by plaintiff in error (Tr. p. 146).

The specific objection made (Tr. p. 146) was that the information sought was privileged under the Idaho statute.

The objection was sustained and such ruling is assigned as error.

Section 5958 of the Revised Codes of Idaho provides as follows:

> "There are particular action in which it is the policy of the law to encourage confidence and preserve it inviolate. Therefore a person cannot be examined as a witness in the following cases:
>
> 4—A physician or surgeon cannot, without the consent of his patient, be examined in civil actions as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for his patient."

Plaintiff in error contends that because defendant in error testified upon the trial as to his injuries he waived the privilege. There is no claim made, nor could it be, that defendant in error testified to any relation of any kind with Dr. Rolfs, nor to any information given him by Dr. Rolfs, nor did he testify to anything other than the physical infirmities from which he suffered as a result of the accident in question.

Plaintiff in error quotes extensively from general treatment of the subject by Wigmore, but, counsel relying to such an extent upon such authority (brief 31-32-33-34) have, for some reason, failed to include the further fact that the learned author himself concedes that the settled law of the land is otherwise. The statutes of the states and the unvarying current of authority demonstrate that the claim of error here made cannot be supported.

Your Honors must bear in mind the distinction that arises, where legitimate claim of waiver may be justly raised, in the class of cases cited by plaintiff in error under stipulation and agreements in the insurance cases where the insured stipulate and agree not to claim privilege, and cases where the injured party offers in evidence oral or written statements of the physician as to his physical condition. Such cases have no application to the facts in this case. Cases from a great majority of the states might be cited, but for the purpose of brevity we respectfully refer your Honors to a very illustrative case upon the subject, where Justice Sanborn has collected a large number of cases which sustain our position.

See *Union Pac. R. Co. vs. Thomas,* 152 Fed. 365-367.

At page 368 it is said:

> "Another position of counsel for the company is that the plaintiff waived her privilege because she testified to the communication, and thereby rendered the evidence of the physicians competent. Testimony voluntarily produced on behalf of a patient or a client of communications between him and his physician or his attorney undoubtedly waives his privilege and exempts the evidence of the physician or attorney relative to the communication

from all objection on the ground that is it confidential or privileged, because the patient or client has thereby made it public. Hunt v. Blackburn, 128 U. S. 464, 470, 9 Sup. Ct. 125. 32 L. Ed. 488. But the reason for this rule is that the patient or client has deprived the communication of its confidential character by voluntarily causing it to be recited in public. Testimony that is not voluntarily given and evidence that does not recite the communication works no waiver, because the reason for the rule there ceases, and the rule becomes inapplicable. Burgess v. Sims Drug Co., 114 Iowa 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359."

And at page 369 the following is found:

"Counsel have cited in support of their claim of waiver here the argument of Prof. Wigmore, in section 2389 of the third volume of his work on Evidence, that the law ought to be that the commencement of an action on account of a physical ailment or the voluntary testimony of the plaintiff to his physical condition is a waiver of his privilege to prevent his physicians from testifying concerning them. Suffice it to say that the learned author himself concedes, and the statutes of the states and the unvarying current of authority demonstrate, that the settled law of the land is otherwise. Williams v. Johnson, 112 Ind. 273, 13 N. E. 872; McConnell v. Osage, 80 Iowa 293, 45 N. W. 550, 8 8 L. R. A. 778; Green v. Nebagamain, 113 Wis. 508, 89 N. W., 520, 521. The only other authority brought forward to sustain the waiver is Sovereign Camp of Woodmen of the World v. Grandon, 64 Neb.

> 39, 89 N. W. 448, a case in which the introduction by the plaintiff of a written statement by the physician of the condition of the patient was held to be a waiver of the privilege to object to his testimony to that condition, a proposition which is conceded, but which has no application to the facts of this case."

The fallacy of the position of plaintiff in error is best demonstrated by a brief discussion of the cases cited in the brief, beginning at page 34.

The first case, Lane vs. Boycourt, 27 N. E. 1111, is quoted from upon three pages of brief. A reading of the case will demonstrate it was a malpractice case instituted against the attending physician. Plaintiff and her relatives testified as to the claimed negligent acts of the defendant committed at the time of the operation which plaintiff claimed was negligently performed. Defendant testified fully, giving his version of what occurred without objection, and called Dr. Williamson, who assisted at the operation, and objection was made to his testimony. Upon such a state of facts plaintiff clearly waived the right to later claim privilege. but the distinction in such a case is readily apparent.

The case of Reinan vs. Dennin, 9 N. E. 3204, erroneously cited in brief 36, should be page 320,

and in this case the Court of Appeals of New York sustains and affirms the action of the lower court in rejecting the proffered evidence of an examining physician under the New York statute. The case was no doubt cited without reading it, as the views expressed are directly contra to the contention of plaintiff in error.

There is no such case as Morris v. N. Y. O. & W. Ry. 42 N. W. 410 (N. Y.), cited at brief 36, nor is there such a case as In re Burnett, 55 Pac. 575 (cited brief 36).

The case of State vs. Long, 165 S. W. 749 (brief 36), which counsel say is too lengthy to quote from, was a criminal case, involving the crime of seduction. The state claimed privilege—not the patient —and the Supreme Court of Missouri held the statute of that state gave the right to claim privilege solely to the patient.

The balance of the brief upon this subject deals with a host of cases from the Supreme Court of Oklahoma, and the reasoning of that court is against the weight of authority.

The case of Hunt vs. Blackburn, 128 U. S. 464, 32 L. Ed. 488 (brief 43) serves to further illustrate the fallacy of counsel's position where a

plaintiff testified fully as to what transpired between herself and her attorney and then sought to close the mouth of the attorney from giving his version of the facts by claiming privilege, and the case of U. P. Ry. Co. vs. Thomas, 152 Fed. 365 (brief 43) is a case upon all fours against the contention here made and has heretofore been cited by us in this brief and quoted from extensively.

The statute of Idaho, under which this question was raised, has heretofore been passed upon by the Supreme Court of Idaho.

See:

Jones vs. City of Caldwell, 20 Idaho 5; 116 Pac. 110.

Jones vs. City of Caldwell, 23 Idaho 467; 130 Pac. 995.

Brayman vs. Russel & Pugh Lbr. Co., 169 Pac 932-934, Dec. 27, 1917.

In the Jones case, supra, twice before the Supreme Court of Idaho, because of the error of the lower court in admitting the testimony of a physician, which was objected to, the theory of counsel in the case at bar is repudiated. In that case the

plaintiff called one of the physicians in attendance, but did not call the other. The defendant then called as a witness the other physician who assisted at the operation. Plaintiff objected upon the ground of privilege, which was overruled by the Trial Court, and this action of the court was held error, and a new trial was granted by the Supreme Court. The same contention was made by the respondent (defendant below) as is here made that the plaintiff by calling one of the physicians to testify waived the right to object to the testimony of the physician who assisted in the operation. This situation presents the precise question which is raised in this case, and the respondent there relied upon the authority of Wigmore on Evidence and the same quotation was made from that author that is found in the brief in this case.

The Court said:

> "In the last sentence the author concedes that his views there expressed are generally not conceded by the decisions of courts of last resort. However, the legislature in this state enacted said section 5958, which provides, among other things, that a physician or surgeon cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or to act for the patient. *If the provisions of*

that section result in the suppression of truth, this Court has not the power or the authority to repeal said statute by judicial decision. (Ours).

As sustaining the view that a plaintiff may waive his privilege in regard to one of his physicians and not waive it as to another, see Hope v. Troy, etc., Ry Co., 40 Hun, 438; Record v. Village of Saratoga Springs, 46 Hun. 438; St. Ry. v. Shephers, 30 Ind. App. 193, 65 N. . 765; Baxter v. City of Cedar Rapids, 103 Iowa 599, 72 N. W. 790; Dotton v. City of Albion, 57 Mich. 575, 24 N. W. 786; Mellor v. Mo. Pac. Ry. Co., 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; Metropolitan St. Ry. Co. v. Jacobi, 112 Federal, 924, 50 C. C. A. 619. It was held in Pa. M. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769. that the examination by the plaintiff of one physician is not a waiver of the privilege as to any other physician. Williams v. Johnson, 112 Ind. 273, 13 N. E. 872.

We conclude that the decided weight of authority is in favor of the view that a waiver of the privilege as to one physician does not waive the privilege as to any other physician. It is also very clear that our statute forbids and prohibits the examination of a physician without the consent of the patient, and this privilege extends to the *individual witness,* and not to the *consultation* or *transaction* in which he was a physician. In other words, each individual physician is a witness within the meaning of this statute, rather than a number of physicians who may be present or participate in a consultation, being treated as one witness, as appears to be done by Prof.

> Wigmore. As we view it, the plaintiff did not waive the privilege so far as Dr. Stewart is concerned, by calling Dr. Miller to testify for her, and, if the provisions of said section 5958 resulted in the suppression of truth, that is a matter for legislative consideration. Counsel for defendant contends that Dr. Stewart was called to testify as an expert, and that his evidence should have been given to the jury for that reason. By calling a physician as an expert, the provisions of said section 5958 cannot be evaded and the witness permitted to base his opinions on information acquired while attending the patient. *If that were permitted, the provisions of said statute would be without force or effect.*" (Ours.)

The Brayman case, supra, just decided by the Supreme Court of Idaho, reviews the earlier decisions of that state, approves of the Jones case, supra, and quotes from the Supreme Court of California. (McCrea vs. rickson, 1 Cal. App. 326, 82 Pac. 209), where the statute of that state, identical with the statute of Idaho, is construed, in a case where the same contention as raised here, was considered, and the question is decided adversely to the position taken by plaintiff in error in the case at bar.

Thus the Supreme Court of Idaho having judicially determined the applicability of the statute involved, its holding should be conclusive, and the

statute cannot be repealed by judicial decision.

What we have said upon this subject should be decisive of the question, but the precise question has been passed upon by the Supreme Court of the United States in the case of Arizona & N. W. R. Co. vs. Clark, 235 U. S. 669; 59th L. Ed. 415-418, and in the dissenting opinion by Justice Hughes (page 420) will be found the identical cases which plaintiff in error has extensively cited and quoted from, but the majority opinion, and the cases there cited are not referred to or mentioned.

Another suggestion which might be made in passing is that no motion for New Trial was here made or presented, and no question is raised as to the amount of the verdict. The proffered testimony of Dr. Rolfs referred solely to the question of defendant in error wearing a truss before the time of the injury complained of. There was substantial evidence of serious injuries other than hernia claimed and proven, and the proffered testimony referring solely to one of the conditions claimed could not in anywise have affected the verdict in the face of the fact that no claim is made that the verdict is or was excessive.

We respectfully pray an affirmance of the verdict and judgment.

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